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UNITED STATES REPORTS

VOLUME 448

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1979

JUNE 25 THROUGH SEPTEMBER 18, 1980

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

MAINE ET AL. *v.* THIBOUTOT ET VIR.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 79–838. Argued April 22, 1980—Decided June 25, 1980

Held:

1. Title 42 U. S. C. § 1983—which provides that anyone who, under color of state statute, regulation, or custom deprives another of any rights, privileges, or immunities "secured by the Constitution *and laws*" shall be liable to the injured party—encompasses claims based on purely statutory violations of federal law, such as respondents' state-court claim that petitioners had deprived them of welfare benefits to which they were entitled under the federal Social Security Act. Given that Congress attached no modifiers to the phrase "and laws," the plain language of the statute embraces respondents' claim, and even were the language ambiguous this Court's earlier decisions, including cases involving Social Security Act claims, explicitly or implicitly suggest that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. Cf., *e. g.*, *Rosado* v. *Wyman*, 397 U. S. 397; *Edelman* v. *Jordan*, 415 U. S. 651; *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. Pp. 4–8.

2. In view of its plain language and legislative history, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988—which provides that attorney's fees may be awarded to the prevailing party (other than the United States) in "*any* action . . . to enforce" a provision of § 1983, *inter alia*, and which makes no exception for statutory § 1983 actions—authorizes the award of attorney's fees in such actions.

Moreover, it follows from the legislative history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in a federal court or, as was the instant action, in a state court. Pp. 8–11.

405 A. 2d 230, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 11.

James Eastman Smith, Assistant Attorney General of Maine, argued the cause for petitioners. With him on the briefs was *Richard S. Cohen*, Attorney General.

Robert Edmond Mittel argued the cause for respondents. With him on the brief were *Susan Calkins* and *Hugh Calkins*.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The case presents two related questions arising under 42 U. S. C. §§ 1983 and 1988. Respondents brought this suit in the Maine Superior Court alleging that petitioners, the State of Maine and its Commissioner of Human Services, violated § 1983 by depriving respondents of welfare benefits

*A brief of *amici curiae* urging reversal was filed by *Edward G. Biester, Jr.*, Attorney General, and *Robert E. Kelly* and *Allen C. Warshaw*, Deputy Attorneys General, for the Commonwealth of Pennsylvania, joined by officials for their respective States as follows: *Francis X. Bellotti*, Attorney General of Massachusetts, and *Garrick F. Cole*, Assistant Attorney General; *John J. Degnan*, Attorney General of New Jersey, and *Andrea Silkowitz*, Deputy Attorney General; *Thomas D. Rath*, Attorney General of New Hampshire; *M. Jerome Diamond*, Attorney General of Vermont, and *Benson Scotch*, Assistant Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, *Allen P. Rubine*, Deputy Attorney General, and *John S. Foley* and *Eileen G. Cooney*, Special Assistant Attorneys General; and *Richard S. Gebelein*, Attorney General of Delaware, and *Regina M. Small*, State Solicitor.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis* for the American Civil Liberties Union et al.; and by *Carol Goodman* for the Volunteer Lawyers Project of the Boston Bar Association et al.

to which they were entitled under the federal Social Security Act, specifically 42 U. S. C. § 602 (a)(7). The petitioners present two issues: (1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party in such an action.[1]

I

Respondents, Lionel and Joline Thiboutot, are married and have eight children, three of whom are Lionel's by a previous marriage. The Maine Department of Human Services notified Lionel that, in computing the Aid to Families with Dependent Children (AFDC) benefits to which he was entitled for the three children exclusively his, it would no longer make allowance for the money spent to support the other five children, even though Lionel is legally obligated to support them. Respondents, challenging the State's interpretation of 42 U. S. C. § 602 (a)(7), exhausted their state administrative remedies and then sought judicial review of the administrative action in the State Superior Court. By amended complaint, respondents also claimed relief under § 1983 for themselves and others similarly situated. The Superior Court's judgment enjoined petitioners from enforcing the challenged rule and ordered them to adopt new regulations, to notify class members of the new regulations, and to pay the correct amounts retroactively to respondents and prospectively to eligible class members.[2] The court, however, denied respondents' motion for attorney's fees. The Supreme Judicial Court of Maine, 405 A. 2d 230 (1979), concluded that re-

[1] Petitioners also argue that jurisdiction to hear § 1983 claims rests exclusively with the federal courts. Any doubt that state courts may also entertain such actions was dispelled by *Martinez* v. *California*, 444 U. S. 277, 283–284, n. 7 (1980). There, while reserving the question whether state courts are *obligated* to entertain § 1983 actions, we held that Congress has not barred them from doing so.

[2] The State did not appeal the judgment against it.

spondents had no entitlement to attorney's fees under state law, but were eligible for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988.[2] We granted certiorari. 444 U. S. 1042 (1980). We affirm.

II

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.

Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. *Rosado* v. *Wyman*, 397 U. S. 397 (1970), for example, "held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States." *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974). *Monell* v. *New York*

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[2] The Supreme Judicial Court remanded to allow the Superior Court to exercise its discretion under § 1988 to determine the appropriate disposition of the fee request.

City Dept. of Social Services, 436 U. S. 658, 700–701 (1978), as support for its conclusion that municipalities are "persons" under § 1983, reasoned that "there can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." Similarly, *Owen* v. *City of Independence*, 445 U. S. 622, 649 (1980), in holding that the common-law immunity for discretionary functions provided no basis for according municipalities a good-faith immunity under § 1983, noted that a court "looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Mitchum* v. *Foster*, 407 U. S. 225, 240, n. 30 (1972), and *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 543, n. 7 (1972), noted that § 1983's predecessor "was enlarged to provide protection for rights, privileges, or immunities secured by federal law." *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966), observed that under § 1983 state "officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." The availability of this alternative sanction helped support the holding that 28 U. S. C. § 1443 (1) did not permit removal to federal court of a state prosecution in which the defense was that the state law conflicted with the defendants' federal rights. As a final example, Mr. Justice Stone, writing in *Hague* v. *CIO*, 307 U. S. 496, 525–526 (1939), expressed the opinion that § 1983 was the product of an "exten[sion] to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution."

While some might dismiss as dictum the foregoing statements, numerous and specific as they are, our analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. Constitutional claims were also raised

in these cases, providing a jurisdictional base, but the statutory claims were allowed to go forward, and were decided on the merits, under the court's pendent jurisdiction. In each of the following cases § 1983 was necessarily the exclusive statutory cause of action because, as the Court held in *Edelman* v. *Jordan*, 415 U. S., at 673–674; *id.*, at 690 (MARSHALL, J., dissenting), the SSA affords no private right of action against a State. *Miller* v. *Youakim*, 440 U. S. 125, 132, and n. 13 (1979) (state foster care program inconsistent with SSA); *Quern* v. *Mandley*, 436 U. S. 725, 729, and n. 3 (1978) (state emergency assistance program consistent with SSA); *Van Lare* v. *Hurley*, 421 U. S. 338 (1975) (state shelter allowance provisions inconsistent with SSA); *Townsend* v. *Swank*, 404 U. S. 282 (1971) (state prohibition against AFDC aid for college students inconsistent with SSA); *King* v. *Smith*, 392 U. S. 309, 311 (1968) (state cohabitation prohibition inconsistent with SSA). Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 532–533, 543 (1974) (District Court had jurisdiction to decide whether state recoupment provisions consistent with SSA); *Carter* v. *Stanton*, 405 U. S. 669, 670 (1972) (District Court had jurisdiction to decide whether state absent-spouse rule consistent with SSA).

In the face of the plain language of § 1983 and our consistent treatment of that provision, petitioners nevertheless persist in suggesting that the phrase "and laws" should be read as limited to civil rights or equal protection laws.[4] Petitioners suggest that when § 1 of the Civil Rights Act of 1871, 17 Stat. 13, which accorded jurisdiction and a remedy for deprivations of rights secured by "the Constitution of the United States," was divided by the 1874 statutory revision into a remedial section, Rev. Stat. § 1979, and jurisdictional

[4] Where the plain language, supported by consistent judicial interpretation, is as strong as it is here, ordinarily "it is not *necessary* to look beyond the words of the statute." *TVA* v. *Hill*, 437 U. S. 153, 184, n. 29 (1978).

sections, Rev. Stat. §§ 563 (12) and 629 (16), Congress intended that the same change made in § 629 (16) be made as to each of the new sections as well. Section 629 (16), the jurisdictional provision for the circuit courts and the model for the current jurisdictional provision, 28 U. S. C. § 1343 (3), applied to deprivations of rights secured by "the Constitution of the United States, or of any right secured by any law providing for equal rights." On the other hand, the remedial provision, the predecessor of § 1983, was expanded to apply to deprivations of rights secured by "the Constitution and laws," and § 563 (12), the provision granting jurisdiction to the district courts, to deprivations of rights secured by "the Constitution of the United States, or of any right secured by any law of the United States."

We need not repeat at length the detailed debate over the meaning of the scanty legislative history concerning the addition of the phrase "and laws." See *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979); *id.*, at 623 (POWELL, J., concurring); *id.*, at 646 (WHITE, J., concurring in judgment); *id.*, at 672 (STEWART, J., dissenting). One conclusion which emerges clearly is that the legislative history does not permit a definitive answer. *Id.*, at 610–611; *id.*, at 674 (STEWART, J., dissenting). There is no express explanation offered for the insertion of the phrase "and laws." On the one hand, a principal purpose of the added language was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Id.*, at 637 (POWELL, J., concurring). On the other hand, there are no indications that that was the only purpose, and Congress' attention was specifically directed to this new language. Representative Lawrence, in a speech to the House of Representatives that began by observing that the revisers had very often changed the meaning of existing statutes, 2 Cong. Rec. 825 (1874), referred to the civil rights statutes as "possibly [showing] ver-

bal modifications bordering on legislation," *id.*, at 827. He went on to read to Congress the original and revised versions. In short, Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended.[5] Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections,[6] it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983. Cf. *TVA* v. *Hill*, 437 U. S. 153 (1978).

III

Petitioners next argue that, even if this claim is within § 1983, Congress did not intend statutory claims to be covered by the Civil Rights Attorney's Fees Awards Act of 1976,

[5] In his concurring opinion in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979), MR. JUSTICE POWELL's argument proceeds on the basis of the flawed premise that Congress did not intend to change the meaning of existing laws when it revised the statutes in 1874. He assumed that Congress had instructed the revisers not to make changes, and that the revisers had obeyed those instructions. In fact, the second section of the statute creating the Revision Commission, 14 Stat. 75, mandated that the commissioners "mak[e] such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Furthermore, it is clear that Congress understood this mandate to authorize the Commission to do more than merely "copy and arrange in proper order, and classify in heads the actual text of statutes in force." 2 Cong. Rec. 825 (1874). We have already decided that the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance" cannot be taken at face value. *United States* v. *Price*, 383 U. S. 787, 803 (1966) (holding that the revisers significantly broadened the forerunner of 18 U. S. C. § 242).

[6] There is no inherent illogic in construing § 1983 more broadly than § 1343 (3) was construed in *Chapman* v. *Houston Welfare Rights Organization*, *supra*. It would only mean that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U. S. C. § 1331 (a)'s $10,000 jurisdictional amount is satisfied.

which added the following sentence to 42 U. S. C. § 1988 (emphasis added):

> "In *any action* or proceeding *to enforce* a provision of sections 1981, 1982, *1983,* 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. 1681 et seq.] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U. S. C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Once again, given our holding in Part II, *supra,* the plain language provides an answer. The statute states that fees are available in *any* § 1983 action. Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit.[7]

The legislative history is entirely consistent with the plain language. As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debates that the statute would make fees available more broadly. Represent-

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[7] The States appearing as *amici* suggest that *Hutto* v. *Finney,* 437 U. S. 678 (1978), left open the issue whether Congress, exercising its power under § 5 of the Fourteenth Amendment, could set aside the States' Eleventh Amendment immunity in statutory as opposed to constitutional cases. *Hutto,* however, concluded alternatively that the Eleventh Amendment did not bar attorney's fee awards in federal courts because the fee awards are part of costs, which "have traditionally been awarded without regard for the State's Eleventh Amendment immunity." *Id.,* at 695. No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."

ative Drinan explained that the Act would apply to § 1983 and that § 1983 "authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example Blue against Craig, 505 F. 2d 830 (4th Cir. 1974)." 122 Cong. Rec. 35122 (1976).[8] Senator Kennedy also included an SSA case as an example of the cases "enforc[ing] the rights promised by Congress or the Constitution" which the Act would embrace.[9] *Id.*, at 33314.[10] In short, there can be no question that Congress passed the Fees Act anticipating that it would apply to statutory § 1983 claims.

Several States, participating as *amici curiae*, argue that even if § 1988 applies to § 1983 claims alleging deprivations of statutory rights, it does not apply in state courts. There is no merit to this argument.[11] As we have said above, *Mar-*

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[8] In *Blue* v. *Craig*, the plaintiffs claimed that North Carolina's Medicaid plan was inconsistent with the SSA.

[9] "In a case now pending, officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State. *Bond* v. *Stanton*, 528 F. 2d 688 (7th Cir. 1976)." 122 Cong. Rec. 33314 (1976). In the same list of examples, Senator Kennedy included *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972), in which plaintiffs demonstrated violations of "the Department of Transportation Act of 1966 and various sections of 23 U. S. C. dealing with housing displacement and relocation." *Id.*, at 95.

[10] The Committee Reports are in accord. The Senate Report recognized that actions under § 1983 covered by the Act would include suits "redressing violations of the Federal Constitution or laws." S. Rep. No. 94–1011, p. 4 (1976). The House Report, after suggesting that a party prevailing on a claim which could not support a fee award should be entitled to a determination on an attached claim covered by § 1988 in order to determine eligibility for fees, recognizes that a special problem is presented because "[i]n some instances . . . the claim with fees may involve a constitutional question. . . ." H. R. Rep. No. 94–1558, p. 4, n. 7 (1976). The negative pregnant is that in other instances the claim with fees need not involve a constitutional question.

[11] The state courts which have addressed this issue have reached that same result. 405 A. 2d 230, 239 (Me. 1979) (case below); *Ramirez* v.

tinez v. *California*, 444 U. S. 277 (1980), held that § 1983 actions may be brought in state courts. Representative Drinan described the purpose of the Civil Rights Attorney's Fees Awards Act as "authoriz[ing] the award of a reasonable attorney's fee in actions brought in State or Federal courts." 122 Cong. Rec. 35122 (1976). And Congress viewed the fees authorized by § 1988 as "an integral part of the remedies necessary to obtain" compliance with § 1983. S. Rep. No. 94–1011, p. 5 (1976). It follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court.[12]

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds today, almost casually, that 42 U. S. C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. Having transformed purely statutory claims into "civil rights" actions under § 1983, the Court concludes that 42 U. S. C. § 1988 per-

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County of Hudson, 169 N. J. Super. 455, 404 A. 2d 1271 (1979); *Tobeluk* v. *Lind*, 589 P. 2d 873 (Alaska 1979); *Young* v. *Toia*, 66 App. Div. 2d 377, 413 N. Y. S. 2d 530 (1979); *Lange* v. *Nature Conservancy, Inc.*, 24 Wash. App. 416, 422, 601 P. 2d 963, 967 (1979); *Board of Trustees* v. *Holso*, 584 P. 2d 1009 (Wyo. 1978); *Thorpe* v. *Durango School District*, 41 Colo. App. 473, 591 P. 2d 1329 (1978), cert. granted by Colorado Supreme Court (1979).

[12] If fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts. Moreover, given that there is a class of cases stating causes of action under § 1983 but not cognizable in federal court absent the $10,000 jurisdictional amount of § 1331 (a), see n. 6, *supra*, some plaintiffs would be forced to go to state courts, but contrary to congressional intent, would still face financial disincentives to asserting their claimed deprivations of federal rights.

mits the "prevailing party" to recover his attorney's fees. These two holdings dramatically expand the liability of state and local officials and may virtually eliminate the "American Rule" in suits against those officials.

The Court's opinion reflects little consideration of the consequences of its judgment. It relies upon the "plain" meaning of the phrase "and laws" in § 1983 and upon this Court's assertedly "consistent treatment" of that statute. *Ante*, at 4, 6. But the reading adopted today is anything but "plain" when the statutory language is placed in historical context. Moreover, until today this Court never had held that § 1983 encompasses all purely statutory claims. Past treatment of the subject has been incidental and far from consistent. The only firm basis for decision is the historical evidence, which convincingly shows that the phrase the Court now finds so clear was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress. To read "and laws" more broadly is to ignore the lessons of history, logic, and policy.

Part I of this opinion examines the Court's claim that it only construes the "plain meaning" of § 1983, while Part II reviews the historical evidence on the enactment. Part III considers the practical consequences of today's decision. The final substantive section demonstrates that this Court's precedents do not support the Court's ruling today.

I

Section 1983 provides in relevant part that "[e]very person who, under color of [state law,] subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." The Court asserts that "the phrase 'and laws' . . . means what it says," because "Congress attached no modifiers to the phrase. . . ." *Ante*, at 4. Finding no "definitive" contrary indications in the legislative history of § 1983, the Court concludes that that statute provides a

remedy for violations of the Social Security Act. The Court suggests that those who would read the phrase "and laws" more narrowly should address their arguments to Congress. *Ante*, at 8.

If we were forbidden to look behind the language in legislative enactments, there might be some force to the suggestion that "and laws" must be read to include all federal statutes. *Ante*, at 4.[1] But the "plain meaning" rule is not as inflexible as the Court imagines. Although plain meaning is always the starting point, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring), this Court rarely ignores available aids to statutory construction. See, *e. g.*, *Cass* v. *United States*, 417 U. S. 72, 77–79 (1974); *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), quoting *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940). We have recognized consistently that statutes are to be interpreted " 'not only by a considera-

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[1] The "plain meaning" of "and laws" may be more elusive than the Court admits. One might expect that a statute referring to all rights secured either by the Constitution or by the laws would employ the disjunctive "or." This is precisely what Congress did in the only Civil Rights Act that referred to laws when it was originally enacted. Act of May 31, 1870, § 6, 16 Stat. 141 (now codified at 18 U. S. C. § 241). That statute created criminal penalties for conspiracy to deprive persons of rights secured by "the Constitution *or* laws." *Ibid.* (emphasis added). Five years later, when Congress enacted a statute providing for general federal-question jurisdiction, it described matters "arising under the Constitution *or* laws." Act of Mar. 3, 1875, § 1, 18 Stat. 470 (emphasis added) (now codified at 28 U. S. C. § 1331).

In contrast, a natural reading of the conjunctive "and" in § 1983 would require that the right at issue be secured both by the Constitution and by the laws. In 1874, this would have included the rights set out in the Civil Rights Act of 1866, which had been incorporated in the Fourteenth Amendment and re-enacted in the Civil Rights Act of 1870. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1329, 1333–1334 (1952). The legislative history does not suggest that the Court should adopt such a limited construction. But an advocate of "plain meaning" hardly can ignore the ambiguity.

tion of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.' " *District of Columbia* v. *Carter*, 409 U. S. 418, 420 (1973), quoting *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258 (1937); see generally *TVA* v. *Hill*, 437 U. S. 153, 204–205, and n. 14 (1978) (POWELL, J., dissenting).

The rule is no different when the statute in question is derived from the civil rights legislation of the Reconstruction Era. Those statutes "must be given the meaning and sweep" dictated by "their origins and their language"—not their language alone. *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 549 (1972). When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the Civil Rights Acts to include words that Congress inadvertently omitted. See *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 582–586 (1976) (interpreting 28 U. S. C. § 1343 (3) to confer jurisdiction upon territorial courts). Thus, "plain meaning" is too simplistic a guide to the construction of § 1983.

Blind reliance on plain meaning is particularly inappropriate where, as here, Congress inserted the critical language without explicit discussion when it revised the statutes in 1874. See *ante*, at 6–7. Indeed, not a single shred of evidence in the legislative history of the adoption of the 1874 revision mentions this change. Since the legislative history also shows that the revision generally was not intended to alter the meaning of existing law, see Part II, *infra*, this Court previously has insisted that apparent changes be scrutinized with some care. As Mr. Justice Holmes observed, the Revised Statutes are "not lightly to be read as making a change. . . ." *United States* v. *Sischo*, 262 U. S. 165, 168–169 (1923).

II

The origins of the phrase "and laws" in § 1983 were discussed in detail in two concurring opinions last Term. Com-

pare *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 623 (1979) (POWELL, J., concurring), with *id.*, at 646 (WHITE, J., concurring in judgment). I shall not recount the full historical evidence presented in my *Chapman* opinion. Nevertheless, the Court's abrupt dismissal of the proposition that "Congress did not intend to change the meaning of existing laws when it revised the statutes in 1874," *ante*, at 8, n. 5, reflects a misconception so fundamental as to require a summary of the historical record.

A

Section 1983 derives from § 1 of the Civil Rights Act of 1871, which provided a cause of action for deprivations of constitutional rights only. "Laws" were not mentioned. Act of Apr. 20, 1871, 17 Stat. 13. The phrase "and laws" was added in 1874, when Congress consolidated the laws of the United States into a single volume under a new subject-matter arrangement. See 2 Cong. Rec. 827 (Jan. 21, 1874) (remarks of Rep. Lawrence). Consequently, the intent of Congress in 1874 is central to this case.

In addition to creating a cause of action, § 1 of the 1871 Act conferred concurrent jurisdiction upon "the district or circuit courts of the United States. . . ." 17 Stat. 13. In the 1874 revision, the remedial portion of § 1 was codified as § 1979 of the Revised Statutes, which provided for a cause of action in terms identical to the present § 1983. The jurisdictional portion of § 1 was divided into § 563 (12), conferring district court jurisdiction, and § 629 (16), conferring circuit court jurisdiction. Although §§ 1979, 563 (12), and 629 (16) came from the same source, each was worded differently. Section 1979 referred to deprivations of rights "secured by the Constitution and laws"; § 563 (12) described rights secured "by the Constitution of the United States, or . . . by any law of the United States"; and § 629 (16) encompassed rights secured "by the Constitution of the United States, or . . . by any law providing for equal rights of citizens of the United

States." [2] When Congress merged the jurisdiction of circuit and district courts in 1911, the narrower language of § 629 (16) was adopted and ultimately became the present 28 U. S. C. § 1343 (3). Act of Mar. 3, 1911, § 24 (14), 36 Stat. 1092.[3]

B

In my view, the legislative history unmistakably shows that the variations in phrasing introduced in the 1874 revision were inadvertent, and that each section was intended to have precisely the same scope. *Chapman* v. *Houston Welfare Rights Org., supra,* at 631–640 (POWELL, J., concurring). Moreover, the only defensible interpretation of the contemporaneous legislative record is that the reference to "laws" in each section was intended "to do no more than ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by [§ 1979]." 441 U. S., at 637. Careful study of the available materials leaves no serious doubt that the Court's contrary conclusion is completely at odds with the intent of Congress in 1874. *Id.,* at 640.

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[2] The 1874 revision also drew a third jurisdictional provision from § 1 of the 1871 Act. That provision authorized review in this Court, without regard to the amount in controversy, of "[a]ny final judgment . . . in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." Rev. Stat. § 699 (4). Thus, § 1 actually became four separate statutes in 1874. In the Court's view, Congress intended to broaden the remedial and district court jurisdictional provisions to encompass violations of *all* laws, while simultaneously restricting circuit court jurisdiction to "laws providing for equal rights." Although the Court does not mention § 699 (4), that statute is not easily read to encompass rights secured by any federal law. Thus, the Court attributes to Congress an intention to create a new class of civil rights claims which could be litigated in district but not circuit courts, and without any right of review in this Court. I would not assume that Congress intended such senseless jurisdictional results.

[3] Section 563 (12) did not survive the 1911 revision.

The Court holds today that the foregoing reasoning is based on a "flawed premise," because Congress instructed the Revision Commission to change the statutes in certain respects. *Ante*, at 8, n. 5; Act of June 27, 1866, § 2, 14 Stat. 75. But it is the Court's premise that is flawed. The Revision Commission, which worked for six years on the project, submitted to Congress a draft that did contain substantive changes.[4] But a Joint Congressional Committee, which was appointed in early 1873 to transform the draft into a bill, concluded that it would be "utterly impossible to carry the measure through, if it was understood that it contained new legislation." 2 Cong. Rec. 646 (Jan. 14, 1874) (remarks of Rep. Poland); see Act of Mar. 3, 1873, 17 Stat. 579. Therefore, the Committee employed Thomas Jefferson Durant to "strike out . . . modifications of the existing law" "wherever the meaning of the law had been changed." 2 Cong. Rec. 646 (Jan. 14, 1874) (remarks of Rep. Poland); see *id.*, at 826 (Jan. 21, 1874) (remarks of Rep. Lawrence); *id.*, at 129 (Dec. 10, 1873) (remarks of Rep. Butler). On December 10, 1873, Durant's completed work was introduced in the House with the solemn assurance that the bill "embodies the law as it is." *Ibid.*[5]

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[4] It is worth noting, however, that the statute creating the Revision Commission also directed that the revisers "shall suggest to Congress" all statutory imperfections they had corrected and "the mode" in which they had done so. Act of June 27, 1866, § 3, 14 Stat. 75. The revisers obeyed this directive by placing marginal comments next to each section they deemed to have amended the law. See 2 Cong. Rec. 648 (Jan. 14, 1874) (Rep. Hoar). That no such comment accompanied § 1979 is strong evidence that the revisers intended no substantive change. See 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 947 (1872).

[5] These assurances were repeated again and again. Representative Butler told his colleagues that the Committee had "not attempted to change the law [in force on December 1, 1873], in a single word or letter, so as to make a different reading or different sense." 2 Cong. Rec. 129 (Dec. 10, 1873). A month later, Representative Poland stated that the bill was

The House met in a series of evening sessions to review the bill and to restore original meaning where necessary. During one of these sessions, Representative Lawrence delivered the speech upon which the Court now relies. *Ante*, at 7–8. Lawrence explained that the revisers often had separated existing statutes into substantive, remedial, and criminal sections to accord with the new organization of the statutes by topic. He read both the original and revised versions of the civil rights statutes to illustrate the arrangement, and "possibly [to] show verbal modifications bordering on legislation." 2 Cong. Rec. 827 (Jan. 21, 1874). After reading § 1979 without mentioning the addition of "and laws," Lawrence stated that "[a] comparison of all these will present a fair specimen of the manner in which the work has been done, and from these all can judge of the accuracy of the translation." *Id.*, at 828. Observing that "[t]his mode of classifying . . . to some extent duplicates in the revision portions of statutes" that previously were one, Lawrence praised "the general accuracy" of the revision. *Ibid.* Nothing in this sequence of remarks supports the decision of the Court today. There was no mention of the addition of "and laws" nor any hint that the reach of § 1983 was to be extended. If Lawrence had any such intention, his statement to the House was

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meant to be "an exact transcript, an exact reflex, of the existing statute law of the United States—that there shall be nothing omitted and nothing changed." *Id.*, at 646 (Jan. 14, 1874). Senator Conkling said that "the aim throughout has been to preserve absolute identity of meaning. . . ." *Id.*, at 4220 (May 25, 1874). See *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 625–627 (1979) (POWELL, J., concurring).

Contrary to the Court's suggestion, *ante*, at 8, n. 5, this Court never has held that "the revisers significantly broadened the forerunner of 18 U. S. C. § 242." *United States* v. *Price*, 383 U. S. 787 (1966), involved the interpretation of 18 U. S. C. § 241. The opinion contained dictum to the effect that the similarly worded § 242 was expanded in 1874. 383 U. S., at 803. But the Court did not consider the legislative history of the 1874 revision, and the passing reference to § 242 certainly is not binding precedent.

a singularly disingenuous way of proposing a major piece of legislation.

In context, it is plain that Representative Lawrence did not mention changes "bordering on legislation" as a way of introducing substantive changes in § 1 of the 1871 Act. Rather, he was emphasizing that the revision was not intended to modify existing statutes, and that his reading might reveal errors that should be eliminated. No doubt Congress "was aware of what it was doing." *Ante*, at 8. It was meeting specially in one last attempt to detect and strike out legislative changes that may have remained in the proposed revision despite the best efforts of Durant and the Joint Committee. No Representative challenged those sections of the Revised Statutes that derived from § 1 of the Civil Rights Act of 1871. That silence reflected the understanding of those present that "and laws" did not alter the original meaning of the statute.[6] The Members of Congress who participated in the yearlong effort to expunge all substantive alterations from the Revised Statutes evinced no intent whatever to enact a far-reaching modification of § 1 of the Civil Rights Act of 1871. The relevant evidence, largely ignored by the Court today, shows that Congress painstakingly sought to avoid just such changes.

III

The legislative history alone refutes the Court's assertion that the 43d Congress intended to alter the meaning of § 1983. But there are other compelling reasons to reject the Court's interpretation of the phrase "and laws." First, by reading those words to encompass every federal enactment, the Court extends § 1983 beyond the reach of its jurisdictional counter-

[6] The addition of "and laws" did not change the meaning of § 1 because Congress assumed that that phrase referred only to federal equal rights legislation. In 1874, the only such legislation was contained in the 1866 and 1870 Civil Rights Acts, which conferred rights also secured by the recently adopted Fourteenth Amendment. See n. 1, *supra*.

part. Second, that reading creates a broad program for enforcing federal legislation that departs significantly from the purposes of § 1983. Such unexpected and plainly unintended consequences should be avoided whenever a statute reasonably may be given an interpretation that is consistent with the legislative purpose. See *Sorrells* v. *United States*, 287 U. S. 435, 446–448 (1932); *United States* v. *Ryan*, 284 U. S. 167, 175 (1931); *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892).

A

The Court acknowledges that its construction of § 1983 creates federal "civil rights" for which 28 U. S. C. § 1343 (3) supplies no federal jurisdiction. *Ante*, at 8, n. 6.[7] The Court finds no "inherent illogic" in this view. *Ibid.* But the gap in the Court's logic is wide indeed in light of the history and purpose of the civil rights legislation we consider today. Sections 1983 and 1343 (3) derive from the same section of the same Act. See *supra*, at 15–16. As originally enacted, the two sections necessarily were coextensive. See *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S., at 616. And this Court has emphasized repeatedly that the right to a federal forum in every case was viewed as a crucial ingredient in the federal remedy afforded by § 1983.

We have stated, for example, that a major purpose of the Civil Rights Acts was to "involve the federal judiciary" in the effort to exert federal control over state officials who refused to enforce the law. *District of Columbia* v. *Carter*, 409 U. S., at 427. Congress did so in part because it thought the state courts at the time would not provide an impartial forum. See *id.*, at 426–429. See generally *Monroe* v. *Pape*, 365 U. S.

[7] Section 1343 (3) supplies jurisdiction for claims involving rights secured by the Constitution "or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." Neither § 1983 itself nor the Social Security Act provides for equal rights within the meaning of this section. *Chapman* v. *Houston Welfare Rights Org.*, *supra*.

167, 174–183 (1961); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1150–1153 (1977). Thus, Congress elected to afford a "uniquely federal remedy," *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972), that is, a " 'federal right *in federal courts,*' " *District of Columbia* v. *Carter*, *supra*, at 428, quoting *Monroe* v. *Pape*, *supra*, at 180 (emphasis added). Four Terms ago, we considered the origins of § 1343 (3) and § 1983 and concluded that "the two provisions were meant to be, and are, complementary." *Examining Board* v. *Flores de Otero*, 426 U. S., at 583; see *Lynch* v. *Household Finance Corp.*, 405 U. S., at 543, n. 7.

The Court ignores these perceptions and dismisses without explanation the proposition, explicitly accepted in *Flores*, that § 1983 and § 1343 (3) are coextensive. The Court cites no evidence that Congress ever intended to alter so fundamentally its original remedial plan, and I am aware of none.[8] Nearly every commentator who has considered the question has concluded that § 1343 (3) was intended to supply federal jurisdiction in all § 1983 actions. See *Chapman* v. *Houston Welfare Rights Org.*, *supra*, at 637, n. 19 (POWELL, J., concurring) (collecting citations).[9] Since § 1343 (3) covers stat-

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[8] In the Court's view today, § 1983 actions based on statutes unrelated to equal rights could have been brought in district but not circuit courts after 1874. See n. 2, *supra*. When Congress merged the two jurisdictional provisions in 1911, the narrower language of the circuit court provision was adopted. Act of Mar. 3, 1911, § 24 (14), 36 Stat. 1092. Yet there is no indication in the legislative history of the 1911 Act that Congress intended to change the scope of federal jurisdiction. The Senate Report states that the new section "merges the jurisdiction now vested in the district court . . . and in the circuit courts . . . and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, pp. 15, 50–51 (1910).

[9] One author thought it "idiotic" to interpret § 1343 (3) and § 1983 differently. Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, 2 Clearinghouse Rev., No. 16, pp. 5, 25 (1969). "Only when there is no uncertainty should the courts conclude that Congress has set up a remedial system which overlooks nothing but the minor

utory claims only when they arise under laws providing for the equal rights of citizens, *Chapman* v. *Houston Welfare Rights Org., supra,* at 615–618, the same limitation necessarily is implicit in § 1983. The Court's decision to apply that statute without regard to the scope of its jurisdictional counterpart is at war with the plainly expressed intent of Congress.

B

The Court's opinion does not consider the nature or scope of the litigation it has authorized. In practical effect, today's decision means that state and local governments, officers, and employees [10] now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to equal or civil rights.[11]

1

Even a cursory survey of the United States Code reveals that literally hundreds of cooperative regulatory and social welfare enactments may be affected.[12] The States now par-

technicality of giving jurisdiction to some court. The courts should be especially reluctant to reach such a result when there is every evidence that a federal forum was a focal point of the legislation." *Ibid.*

[10] Section 1983 actions may be brought against States, municipalities and other subdivisions, officers, and employees. Although I will refer to all such potential defendants as "state defendants" for purposes of this opinion, there may be a notable difference among them. States are protected against retroactive damages awards by the Eleventh Amendment, and individual defendants generally can claim immunity when they act in good faith. Municipalities, however, will be strictly liable for errors in the administration of complex federal statutes. See *Owen* v. *City of Independence,* 445 U. S. 622 (1980).

[11] The only exception will be in cases where the governing statute provides an exclusive remedy for violations of its terms. See *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 150–151, n. 5 (1970); cf. *Great American Fed. S. & L. Assn.* v. *Novotny,* 442 U. S. 366 (1979).

[12] An incomplete sample of statutes requiring federal-state cooperation is collected in the Appendix to this opinion. Plaintiffs also may contend

ticipate in the enforcement of federal laws governing migrant labor, noxious weeds, historic preservation, wildlife conservation, anadromous fisheries, scenic trails, and strip mining. Various statutes authorize federal-state cooperative agreements in most aspects of federal land management. In addition, federal grants administered by state and local governments now are available in virtually every area of public administration. Unemployment, Medicaid, school lunch subsidies, food stamps, and other welfare benefits may provide particularly inviting subjects of litigation. Federal assistance also includes a variety of subsidies for education, housing, health care, transportation, public works, and law enforcement. Those who might benefit from these grants now will be potential § 1983 plaintiffs.

No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial. And the Court advances no reason to believe that any Congress—from 1874 to the present day—intended this expansion of federally imposed liability on state defendants.

Moreover, state and local governments will bear the entire burden of liability for violations of statutory "civil rights" even when federal officials are involved equally in the admin-

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that state activities unrelated to cooperative programs have burdened rights secured by federal statutes. *E. g., Chase* v. *McMasters*, 573 F. 2d 1011, 1017–1019 (CA8) (authority of Secretary of the Interior to hold Indian lands), cert. denied, 439 U. S. 965 (1978); *Wirth* v. *Surles*, 562 F. 2d 319 (CA4 1977) (extradition of prisoners), cert. denied, 435 U. S. 933 (1978); *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (CA2) (right to sit on federal juries), cert. denied, 332 U. S. 825 (1947); *Gage* v. *Commonwealth Edison Co.*, 356 F. Supp. 80, 88 (ND Ill. 1972) (right to an environmental impact statement prior to action in which federal agency participates); *McGuire* v. *Amrein*, 101 F. Supp. 414, 417, 419–420 (Md. 1951) (federal ban on the tapping of telephones).

istration of the affected program. Section 1983 grants no right of action against the United States, and few of the foregoing cooperative programs provide expressly for private actions to enforce their terms. Thus, private litigants may sue responsible federal officials only in the relatively rare case in which a cause of action may be implied from the governing substantive statute. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979). It defies reason to believe that Congress intended—without discussion—to impose such a burden only upon state defendants.

Even when a cause of action against federal officials is available, litigants are likely to focus efforts upon state defendants in order to obtain attorney's fees under the liberal standard of 42 U. S. C. § 1988. There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where "civil rights" of any kind are at best an afterthought. In this case, for example, the respondents added a § 1983 count to their complaint some years after the action was initiated, apparently in response to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976. See also *United States* v. *Imperial Irrigation Dist.*, 595 F. 2d 525, 529 (CA9 1979), rev'd on other grounds *sub nom. Bryant* v. *Yellen*, 447 U. S. 352 (1980). The uses of this technique have not been explored fully. But the rules of pendent jurisdiction are quite liberal, and plaintiffs who prevail on pendent claims may win awards under § 1988. *Maher* v. *Gagne*, *post*, p. 122. Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.[13] Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress in-

[13] See Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act, 2 W. New Eng. L. Rev. 193, 249 (1979).

tended to remove so completely the protection of the "American Rule" in suits against state defendants.[14]

2

When Congress revised the statutes in 1874, it hardly could have anticipated the subsequent proliferation of federal statutes. Yet, congressional power to enact laws under the Spending and Commerce Clauses was well known in 1874. Congress need not have foreseen the ultimate scope of those powers to have understood that the expansion of § 1983 to statutory claims would have serious consequences.

Today's decision confers upon the courts unprecedented authority to oversee state actions that have little or nothing to do with the individual rights defined and enforced by the civil rights legislation of the Reconstruction Era.[15] This result cannot be reconciled with the purposes for which § 1983 was enacted. It also imposes unequal burdens on state and federal officials in the joint administration of federal programs and may expose state defendants to liability for attorney's fees in virtually every case. If any Member of the 43d Congress had suggested legislation embodying these results, the proposal certainly would have been hotly debated. It is sim-

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[14] The few references to statutory claims cited by the Court, *ante*, at 10, and n. 9, fall far short of demonstrating that Congress considered or intended the consequences of the Court's interpretation of § 1983.

[15] Section 1983 was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." Act of Apr. 20, 1871, 17 Stat. 13; see *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). The Civil Rights Attorney's Fees Awards Act of 1976 also was passed under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. 122 Cong. Rec. 33315 (1976) (remarks of Sen. Abourezk); *id.*, at 35123 (remarks of Rep. Drinan). I do not imply that either statute must be limited strictly to claims arising under the post-Civil War Amendments. That Congress elected to proceed under the enforcement powers suggests, however, an intention to protect enduring civil rights rather than the virtually limitless entitlements created by federal statutes.

ply inconceivable that Congress, while professing a firm intention not to make substantive changes in the law, nevertheless intended to enact a major new remedial program by approving—without discussion—the addition of two words to a statute adopted only three years earlier.

IV

The Court finally insists that its interpretation of § 1983 is foreordained by a line of precedent so strong that further analysis is unnecessary. *Ante*, at 4–5. It is true that suits against state officials alleging violations of the Social Security Act have become commonplace in the last decade. *Ibid.* The instant action follows that pattern. Thus, the Court implies, today's decision is a largely inconsequential reaffirmation of a statutory interpretation that has been settled authoritatively for many years.

This is a tempting way to avoid confronting the serious issues presented by this case. But the attempt does not withstand analysis. Far from being a long-accepted fact, purely statutory § 1983 actions are an invention of the last 20 years. And the Court's seesaw approach to § 1983 over the last century leaves little room for certainty on any question that has not been discussed fully and resolved explicitly by this Court. Compare *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), with *Monroe* v. *Pape*, 365 U. S. 167 (1961). Yet, until last Term, neither this Court nor any Justice ever had undertaken—directly and thoroughly—a consideration of the question presented in this case.

A

Commentators have chronicled the tortuous path of judicial interpretation of the Civil Rights Acts enacted after the Civil War. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952); Note, Developments in the Law—Section 1983 and Federalism, 90

Harv. L. Rev. 1133 (1977); Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285 (1953). One writer found only 21 cases decided under § 1983 in the first 50 years of its history. Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?, 26 Ind. L. J. 361, 363 (1951). Another lamented, as late as 1952, that the statute could not be given its intended broad effect without a "judicial and constitutional upheaval of the first magnitude." Gressman, *supra*, at 1357. That upheaval ultimately did take place, and § 1983 actions now constitute a substantial share of the federal caseload.[16] Nevertheless, cases dealing with purely statutory civil rights claims remain nearly as rare as in the early years.

Holt v. *Indiana Manufacturing Co.*, 176 U. S. 68 (1900), appears to be the first reported decision to deal with a statutory claim under § 1983. In that case, the Court dismissed for want of jurisdiction a claim based upon the Constitution and the federal patent laws. The Court stated that §§ 1979, 563 (12), and 629 (16) of the Revised Statutes "refer to civil rights only and are inapplicable here." 176 U. S., at 72. Since *Holt* involved both constitutional and statutory claims, its "civil rights" limitation later was viewed as a general restriction on the application of § 1983.

Although constitutional claims under § 1983 generally were limited to "personal" rights in the wake of *Holt* and Mr. Justice Stone's influential opinion in *Hague* v. *CIO*, 307 U. S.

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[16] Between 1961 and 1977, the number of cases filed in federal court under civil rights statutes increased from 296 to 13,113. See *Butz* v. *Economou*, 438 U. S. 478, 526 (1978) (REHNQUIST, J., dissenting). New filings have remained relatively constant from 1977 to date. See Director of the Administrative Office of the United States Courts Ann. Rep. 6, Table 6 (1979). These figures do not include the many prisoner petitions filed annually under 42 U. S. C. § 1983. *Ibid.* If prisoner petitions are included, the number of civil rights cases filed in 1979 rises to 24,951. See *id.*, at A16–A17, Table C–3.

496, 531 (1939),[17] purely statutory claims remained virtually unrecognized. When the United States Court of Appeals for the Second Circuit considered a statutory claim nearly half a century after *Holt*, it found no case whatever "in which the right or privilege at stake was secured by a 'law' of the United States." *Bomar* v. *Keyes*, 162 F. 2d 136, 139, cert. denied, 332 U. S. 825 (1947). The plaintiff in *Bomar* was a public school teacher who alleged that the school board had discharged her because of absences incurred while exercising her statutory right to serve on a federal jury. The Court of Appeals concluded that the complaint stated a claim under §1983. 162 F. 2d, at 139.

The opinion in *Bomar*, which cited no authority and reviewed no legislative history, provoked widespread commentary. See generally Note, The Propriety of Granting a Federal Hearing for Statutorily Based Actions under the Reconstruction-Era Civil Rights Acts: *Blue* v. *Craig*, 43 Geo. Wash. L. Rev. 1343, 1363–1364, and n. 169 (1975). But it appears to have had little practical effect.[18] The issue did not arise with any frequency until the late 1960's, when challenges to state administration of federal social welfare legislation became commonplace. The lower courts responded to these

[17] Drawing on *Holt* v. *Indiana Manufacturing Co.*, Mr. Justice Stone argued that § 1983 applies only to rights involving "personal liberty, not dependent for [their] existence upon the infringement of property rights." *Hague* v. *CIO*, 307 U. S., at 531. This view was widely held until this Court rejected it in *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972). See Note, The Propriety of Granting a Federal Hearing for Statutorily Based Actions under the Reconstruction-Era Civil Rights Acts: *Blue* v. *Craig*, 43 Geo. Wash. L. Rev. 1343, 1359–1361 (1975). *Lynch* explained the result in *Holt* as a product of special restrictions on federal jurisdiction over challenges to the collection of state taxes. 405 U. S., at 542–543, n. 6.

[18] The prevailing view limiting § 1983 actions to "personal" rights may have discouraged statutory claims. See n. 17, *supra*. And there was little occasion to consider whether § 1983 was limited to "equal rights" statutes, because the personal/property rights distinction served much the same purpose. Note, 43 Geo. Wash. L. Rev., at 1361, n. 157.

suits with conflicting conclusions. Some found § 1983 applicable to all federal statutory claims.[19] Others refused to apply it to purely statutory rights.[20] Yet others believed that § 1983 covered some but not all rights derived from nonconstitutional sources.[21] Numerous scholarly comments discussed the possible solutions, without reaching a consensus.[22]

B

The courts and commentators who debated the issue during this period were singularly obtuse if, as the Court now asserts, all doubt as to the meaning of "and laws" had been resolved by a long line of consistent authority going back to 1939. *Ante*, at 4–5. I know of no court or commentator who has

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[19] *E. g.*, *Blue* v. *Craig*, 505 F. 2d 830, 835–838 (CA4 1974) (Social Security Act); *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569, 579 (CA5 1969) (Wagner-Peyser Act of 1933); *La Raza Unida of Southern Alameda County* v. *Volpe*, 440 F. Supp. 904, 908–910 (ND Cal. 1977) (Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

[20] *E. g.*, *Wynn* v. *Indiana State Department of Public Welfare*, 316 F. Supp. 324, 330–333 (ND Ind. 1970) (Social Security Act).

[21] *E. g.*, *Chase* v. *McMasters*, 573 F. 2d, at 1017, and n. 5 (relationship between Federal Government and Indians embodied in the Indian Organization Act of 1934 has "constitutional dimensions"); *McCall* v. *Shapiro*, 416 F. 2d 246, 249–250 (CA2 1969) (Social Security Act not a statute providing for equal or civil rights); *First Nat. Bank of Omaha* v. *Marquette Nat. Bank*, 482 F. Supp. 514, 521–522 (Minn. 1979) (National Bank Act restriction on interest rates not a statute providing for equal or civil rights); cf. *Schatte* v. *International Alliance of Theatrical Stage Employees*, 182 F. 2d 158, 166–167 (CA9 1950) (Social Security Act and National Labor Relations Act enforceable only by remedies prescribed therein).

[22] See Cover, *supra* n. 9, at 24–25; Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 6–8, 19 (1970); Note, 43 Geo. Wash. L. Rev., *supra* n. 17, at 1361–1362; Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1426 (1972); Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1299–1300 (1953); Note, 16 Geo. Wash. L. Rev. 253, 263 (1948).

thought that all such doubt had been extinguished before today.[23]

The Court quotes the statement in *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974), that *Rosado* v. *Wyman*, 397 U. S. 397 (1970), " 'held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.' " *Ante*, at 4. If that statement is true, the confusion remaining after *Rosado* is simply inexplicable. In fact, of course, *Rosado* established no such proposition of law. The plaintiffs in that case challenged a state welfare provision on constitutional grounds, premising jurisdiction upon 28 U. S. C. § 1343 (3), and added a pendent statutory claim. This Court held first that the District Court retained its power to adjudicate the statutory claim even after the constitutional claim, on which § 1343 (3) jurisdiction was based, became moot. 397 U. S., at 402–405. The opinion then considered the merits of the plaintiffs' argument that New York law did not comport with the Social Security Act. *Id.*, at 407–420. Although the Court had to assume the existence of a private right of action to enforce that Act, the opinion did not discuss or purport to decide whether § 1983 applies to statutory claims.

Rosado is not the only case to have assumed *sub silentio* that welfare claimants have a cause of action to challenge the adequacy of state programs under the Social Security Act. As the Court observes, many of our recent decisions construing the Act made the same unspoken assumption. *Ante*, at 6. It does not necessarily follow that the Court in those cases assumed that the cause of action was provided by § 1983 rather than the Social Security Act itself.[24] But even if it

[23] See, *e. g.*, *La Raza Unida of Southern Alameda County* v. *Volpe*, *supra*, at 908 (issue "has yet to be definitively resolved").

[24] Contrary to the Court's suggestion, *ante*, at 6, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), did not exclude the possibility of an implied private right of action under the Social Security Act. *Edelman* held only that a

did, these cases provide no support for the Court's ruling today. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974); see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 663; *United States* v. *More*, 3 Cranch 159, 172 (1805). This rule applies with even greater force to questions involving the availability of a cause of action, because the question whether a cause of action exists—unlike the existence of federal jurisdiction—may be assumed without being decided. *Burks* v. *Lasker*, 441 U. S. 471, 476, and n. 5 (1979). Thus, the Court's ruling finds no support in past cases in which the issue was not squarely raised. Here, as in *Hagans* v. *Lavine*, *supra*, at 535, n. 5, we must approach the question "as an open one calling for a canvass of the relevant . . . considerations." [25]

The Court also relies upon "numerous and specific" dicta in prior decisions. *Ante*, at 5. But none of the cited cases contains anything more than a bare assertion of the proposition that is to be proved. Most say much less than that. For example, the Court occasionally has referred to § 1983 as a remedy for violations of "federally protected rights" or of "the Federal Constitution and statutes." *Monell* v. *New York City Dept. of Social Services*, *supra*, at 700–701; *Owen* v. *City of Independence*, 445 U. S. 622, 649, 650 (1980). These generalized references merely restate the language of the statute. They shed no light on the question whether all or

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State does not waive its Eleventh Amendment immunity by participating in the federal assistance program established by that Act. *Id.*, at 673–674. Thus, the lower courts properly have regarded the question as undecided. *Holley* v. *Lavine*, 605 F. 2d 638, 646–647 (CA2 1979); *Podrazik* v. *Blum*, 479 F. Supp. 182, 187–188 (NDNY 1979).

[25] In finding an open question in *Hagans*, the Court expressly declined to follow the implicit holdings of no less than eight decisions of this Court. 415 U. S., at 535, n. 5.

only some statutory rights are protected. To the extent they have any relevance to the issue at hand, they could be countered by the frequent occasions on which the Court has referred to § 1983 as a remedy for constitutional violations without mentioning statutes.[26] But the debate would be meaningless, for none of these offhand remarks provides the remotest support for the positions taken in this case.[27]

The only remaining decisions in the Court's "consistent" line of precedents are *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966), and *Edelman* v. *Jordan*, 415 U. S., at 675. In each case, the Court asserted—without discussion and in the course of disposing of other issues—that § 1983's coverage of statutory rights extended beyond federal equal rights laws. Neither contains any discussion of the question; neither cites relevant authority.[28] Nor has this Court always uncritically assumed the proposition for which *Greenwood* and *Edelman*

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[26] *E. g.*, *Monroe* v. *Pape*, 365 U. S., at 172; see *Procunier* v. *Navarette*, 434 U. S. 555, 561–562 (1978); *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

[27] Slightly more specific support may be gleaned from three opinions stating that the Revised Statutes of 1874 "enlarged" or "extended" § 1983's predecessor to provide protection for rights secured by federal laws as well as by the Constitution. *Mitchum* v. *Foster*, 407 U. S. 225, 240, n. 30 (1972); *Lynch* v. *Household Finance Corp.*, 405 U. S., at 543, n. 7; *Hague* v. *CIO*, 307 U. S., at 525–526 (opinion of Stone, J.). But each statement was pure dictum incorporated in a discussion of the historical background of § 1343 (3). Moreover, each merely noted the evident change in language worked by the revisers. None implies that *all* statutory rights are covered by § 1983. Mr. Justice Stone, for example, undoubtedly would be surprised to learn that his opinion—in which he argued that § 1983 applied only to "personal" rights—stands for the proposition that statutory rights are covered without limitation.

[28] *Greenwood* v. *Peacock*, 384 U. S., at 828–829, cited only § 1983 itself and the leading case of *Monroe* v. *Pape*, *supra*. *Monroe* had nothing whatever to do with statutory claims. In *Edelman* v. *Jordan*, *supra*, at 675, the Court relied exclusively on *Rosado* v. *Wyman*, 397 U. S. 397 (1970), which also did not discuss the coverage of § 1983. See *supra*, at 30.

now are said to stand. On the same day the Court decided *Edelman*, it refused to express a view on the question whether § 1983 creates a cause of action for purely statutory claims. *Hagans* v. *Lavine*, *supra*, at 534, n. 5. The point was reserved again in *Southeastern Community College* v. *Davis*, 442 U. S. 397, 404–405, n. 5 (1979).

To rest a landmark decision of this Court on two statements made in dictum without critical examination would be extraordinary in any case. In the context of § 1983, it is unprecedented. Our decisions construing the civil rights legislation of the Reconstruction era have repudiated "blind adherence to the principle of *stare decisis*. . . ." *Greenwood* v. *Peacock*, *supra*, at 831. As Mr. Justice Frankfurter once observed, the issues raised under § 1983 concern "a basic problem of American federalism" that "has significance approximating constitutional dimension." *Monroe* v. *Pape*, 365 U. S., at 222 (dissenting opinion). Although Mr. Justice Frankfurter's view did not prevail in *Monroe*, we have heeded consistently his admonition that the ordinary concerns of *stare decisis* apply less forcefully in this than in other areas of the law. *E. g.*, *Monell* v. *New York City Dept. of Social Services*, *supra*. Against this backdrop, there is no justification for the Court's reliance on unexamined dicta as the principal support for a major extension of liability under § 1983.

V

In my view, the Court's decision today significantly expands the concept of "civil rights" and creates a major new intrusion into state sovereignty under our federal system. There is no probative evidence that Congress intended to authorize the pervasive judicial oversight of state officials that will flow from the Court's construction of § 1983. Although today's decision makes new law with far-reaching consequences, the Court brushes aside the critical issues of congres-

sional intent, national policy, and the force of past decisions as precedent. I would reverse the judgment of the Supreme Judicial Court of Maine.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

A small sample of statutes that arguably could give rise to § 1983 actions after today may illustrate the nature of the "civil rights" created by the Court's decision. The relevant enactments typically fall into one of three categories: (A) regulatory programs in which States are encouraged to participate, either by establishing their own plans of regulation that meet conditions set out in federal statutes, or by entering into cooperative agreements with federal officials; (B) resource management programs that may be administered by cooperative agreements between federal and state agencies; and (C) grant programs in which federal agencies either subsidize state and local activities or provide matching funds for state or local welfare plans that meet federal standards.

A. Joint regulatory endeavors

1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973, as amended, 7 U. S. C. § 136 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 136u, 136v (1976 ed., Supp. III).
2. Federal Noxious Weed Act of 1974, 88 Stat. 2148, 7 U. S. C. §§ 2801–2813; see § 2808.
3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666, as amended, 16 U. S. C. §§ 461–467 (1976 ed. and Supp. III); see § 462 (e).
4. Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. §§ 661–666c; see § 661.
5. Anadromous Fish Conservation Act, 79 Stat. 1125, as amended, 16 U. S. C. §§ 757a–757d (1976 ed., Supp. III); see § 757a (a) (1976 ed., Supp. III).
6. Wild Free-Roaming Horses and Burros Act, 85 Stat.

649, as amended, 16 U. S. C. §§ 1331–1340 (1976 ed. and Supp. III); see § 1336.

7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U. S. C. §§ 1361–1407 (1976 ed. and Supp. III); see § 1379.
8. Wagner-Peyser National Employment System Act, 48 Stat. 113, 29 U. S. C. § 49 *et seq.*; see § 49g (employment of farm laborers).
9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. III); see § 1253 (1976 ed., Supp. III).
10. Interstate Commerce Act, 49 Stat. 548, as amended, 49 U. S. C. § 11502 (a)(2) (1976 ed., Supp. III) (enforcement of highway transportation law).

B. Resource management

1. Laws involving the administration and management of national parks and scenic areas: *e. g.*, Act of May 15, 1965, § 6, 79 Stat. 111, 16 U. S. C. § 281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, § 3, 73 Stat. 591, 16 U. S. C. § 410u (Minute Man National Historical Park); Act of Oct. 27, 1972, § 4, 86 Stat. 1302, 16 U. S. C. § 460bb–3 (b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: *e. g.*, Act of Mar. 1, 1911, § 2, 36 Stat. 961, 16 U. S. C. § 563; Act of Aug. 29, 1935, 49 Stat. 963, 16 U. S. C. §§ 567a–567b.
3. Laws involving the construction and management of water projects: *e. g.*, Water Supply Act of 1958, § 301, 72 Stat. 319, 43 U. S. C. § 390b; Boulder Canyon Projects Act, §§ 4, 8, 45 Stat. 1058, 1062, as amended, 43 U. S. C. §§ 617c, 617g; Rivers and Harbors Appropriation Act of 1899, § 9, 30 Stat. 1151, 33 U. S. C. § 401.
4. National Trails System Act, 82 Stat. 919, as amended, 16

U. S. C. §§ 1241–1249 (1976 ed. and Supp. III); see § 1246 (h) (1976 ed., Supp. III).

5. Outer Continental Shelf Lands Act Amendment of 1978, § 208, 92 Stat. 652, 43 U. S. C. § 1345 (1976 ed., Supp. III) (oil leasing).

C. Grant programs

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. §§ 2011–2026 (1976 ed. and Supp. III); see, *e. g.*, §§ 2020 (e)–2020 (g) (1976 ed., Supp. III).
2. Small Business Investment Act of 1958, § 602 (d), 72 Stat. 698, as amended, 15 U. S. C. § 636 (d) (1976 ed., Supp. III).
3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U. S. C. § 2701 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 2734, 2902.
4. Federal-Aid Highway Act legislation, *e. g.*, 23 U. S. C. §§ 128, 131 (1976 ed. and Supp. III).
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U. S. C. § 801 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653, and amended, 42 U. S. C. § 1437 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 1437d (c), 1437j.
7. National School Lunch Act, 60 Stat. 230, as amended, 42 U. S. C. § 1751 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, § 1758 (1976 ed. and Supp. III).
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U. S. C. § 3121 *et seq.*; see, *e. g.*, §§ 3132, 3151a, 3243.
9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U. S. C. § 3701 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 3742, 3744 (c).

10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. § 5601 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, § 5633 (1976 ed. and Supp. III).
11. Energy Conservation and Production Act, 90 Stat. 1125, as amended, 42 U. S. C. § 6801 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 6805, 6836 (1976 ed. and Supp. III).
12. Developmentally Disabled Assistance and Bill of Rights Act, § 125, 89 Stat. 496, as amended, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 6011, 6063 (1976 ed. and Supp. III).
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U. S. C. § 1601 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 1602, 1604 (g)–(m) (1976 ed. and Supp. III).

ADAMS *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79–5175. Argued March 24, 1980—Decided June 25, 1980

Trials for capital offenses in Texas are conducted in two phases. First, the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty, the trial court holds a separate sentencing proceeding at which additional evidence in mitigation or aggravation is admissible. The jury is then required by statute to answer three specific questions concerning (1) whether the defendant's conduct causing the death at issue was deliberate, (2) whether the defendant's conduct in the future would constitute a continuing threat to society, and (3) whether his conduct in killing the victim was unreasonable in response to the victim's provocation, if any. If the jury answers "Yes" to each of these questions, the court must impose a death sentence, but if the jury answers "No" to any of the questions, the court imposes a life sentence. At the petitioner's murder trial, the Texas trial judge, pursuant to statute (§ 12.31 (b)), excluded from the jury a number of prospective jurors who were unwilling or unable to take an oath that the mandatory penalty of death or life imprisonment would not "affect [their] deliberations on any issue of fact." The jury that was selected convicted petitioner and answered the statutory questions in the affirmative at the punishment phase, thus causing the death sentence to be imposed. On appeal, the Texas Court of Criminal Appeals rejected petitioner's contention that the prospective jurors had been excluded in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510, wherein it was held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment.

Held: Section 12.31 (b) was applied in this case to exclude jurors in contravention of the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon*, *supra*. Pp. 43–51.

(a) The general proposition established by *Witherspoon* and related cases that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath, is applicable to the bifurcated procedure employed by Texas in capital cases. If the Texas juror is to obey his

oath and follow Texas law, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the three statutory questions without conscious distortion or bias. Pp. 43–47.

(b) *Witherspoon* and § 12.31 (b) may not coexist as separate and independent bases for excluding jurors so as to permit exclusion under § 12.31 (b) on grounds broader than permitted by *Witherspoon*. Although the State could, consistently with *Witherspoon*, use § 12.31 (b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths, the use of § 12.31 (b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge to prospective jurors who favor the death penalty is not sufficiently substantial to take § 12.31 (b) out of *Witherspoon*'s ambit. Pp. 47–49.

(c) As § 12.31 (b) was employed here, the touchstone of the inquiry was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt, but rather whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a death sentence imposed by a jury from which such prospective jurors have been excluded. Pp. 49–51.

577 S. W. 2d 717, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 51. BURGER, C. J., concurred in the judgment. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 51. REHNQUIST, J., filed a dissenting opinion, *post*, p. 52.

Melvyn Carson Bruder argued the cause for petitioner. With him on the brief were ***J. Stephen Cooper*** and ***George A. Preston.***

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, and *W. Barton Boling*, Assistant Attorney General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This capital case presents the question whether Texas contravened the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect [their] deliberations on any issue of fact." We hold that there were exclusions that were inconsistent with *Witherspoon*, and we therefore reverse the sentence of death imposed on the petitioner.

I

Trials for capital offenses in Texas are conducted in a two-phase proceeding. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1979). In the first phase, the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty of a capital offense, the trial court holds a separate sentencing proceeding at which a wide range of additional evidence in mitigation or aggravation is admissible. The jury is then required to answer the following questions based on evidence adduced during either phase of the trial:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and

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**Jack Greenberg, James M. Nabrit III, Joel Berger, John Charles Boger*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071 (b).

If the jury finds beyond a reasonable doubt that the answer to each of these questions is "Yes," the court is required to impose a sentence of death. If the jury finds that the answer to any of the three questions is "No," the court imposes a sentence of life imprisonment. Arts. 37.071 (c), (e).

The petitioner in this case was charged with the capital offense of murdering a peace officer.[1] During *voir dire* examination of individual prospective jurors, the prosecutor, and sometimes the trial judge, intensively inquired as to whether

[1] Under Tex. Penal Code Ann. § 19.03 (a) (1) (1974), whoever "murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman" is guilty of a capital felony. Texas also authorizes the death penalty for four other offenses: murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder of a prison employee by a prison inmate. § 19.03.

Under the current Texas capital punishment scheme, the jury's discretion over sentencing is limited both by § 19.03, which authorizes the death penalty for only a small class of aggravated crimes, and by Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1979), which mandates a sentence of death if, but only if, the jury answers "Yes" to each of the statutory penalty questions. This system was adopted in response to the Court's judgment in *Branch* v. *Texas*, decided together with *Furman* v. *Georgia*, 408 U. S. 238 (1972), which struck down a statute giving the jury absolute discretion whether to impose the death penalty or not. The Court upheld the revised Texas capital punishment scheme in *Jurek* v. *Texas*, 428 U. S. 262 (1976).

their attitudes about the death penalty permitted them to take the oath set forth in Tex. Penal Code Ann. § 12.31 (b) (1974). Section 12.31 (b) provides as follows:

> "Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Typically, the prospective juror was first advised that the State was seeking the death penalty and asked to state his general views on the subject, which were sometimes explored in considerable depth. He was then informed in detail of the special procedure used by Texas in capital cases, including in particular the fact that "Yes" answers to the three punishment questions would automatically result in the trial judge's imposing the death sentence. Finally, he was asked whether he could state under oath, as required by § 12.31 (b), that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact. On the State's submission and over petitioner's objections, the trial judge excused a number of prospective jurors who were unwilling or unable to take the § 12.31 (b) oath.

The jury selected under this procedure convicted the petitioner of the charged offense and answered the statutory questions affirmatively at the punishment phase, thus causing the trial judge to impose the death sentence as required by Art. 37.071 (e). On appeal, the petitioner argued that prospective jurors had been excluded in violation of this Court's decision in *Witherspoon* v. *Illinois, supra.* The Texas Court of Criminal Appeals rejected the contention on the authority of its previous cases, which had "consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of [§ 12.31 (b)] to the punishment issues, comports with the constitutional require-

ments of *Witherspoon*." 577 S. W. 2d 717, 728 (1979). We granted the petition for a writ of certiorari, 444 U. S. 990 (1979), limited to the following questions:

> "(1) Is the doctrine of *Witherspoon* v. *Illinois*, 391 U. S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31 (b) violate the doctrine of *Witherspoon* v. *Illinois*, *supra*?" [2]

II

A

Witherspoon involved a state procedure for selecting juries in capital cases, where the jury did the sentencing and had complete discretion as to whether the death penalty should be imposed. In this context, the Court held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment. The State was held to have no valid interest in such a broad-based rule of exclusion, since "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." *Witherspoon* v. *Illinois*, 391 U. S., at 519. The defendant, on the other hand, was seriously prejudiced by the State's practice. The jury which sentenced him to death fell "woefully short of that impartiality to which the petitioner was entitled" on the issue of punishment, *id.*, at 518. By excluding all those who opposed capital punishment, the

[2] In *Burns* v. *Estelle*, 592 F. 2d 1297 (1979), a panel of the Court of Appeals for the Fifth Circuit found that the application of Tex. Penal Code Ann. § 12.31 (b) (1974) to the facts of that case violated *Witherspoon*. The en banc Fifth Circuit has since set the case for rehearing en banc. 598 F. 2d 1016 (1979). The court held oral argument on January 8, 1980, but has as yet issued no decision.

State "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.*, at 520, 521.

The Court recognized that the State might well have power to exclude jurors on grounds more narrowly drawn:

> "[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.*, at 522–523, n. 21 (emphasis in original).

This statement seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. For example, a juror would no doubt violate his oath if he were not impartial on the question of guilt. Similarly, the Illinois law in effect at the time *Witherspoon* was decided required the jury at least to *consider* the death penalty, although it accorded the jury absolute discretion as to whether or not to impose it. A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

In *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969), we again emphasized the State's legitimate interest in obtaining jurors able to follow the law:

> "[I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the in-

> structions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

And in *Lockett* v. *Ohio*, 438 U. S. 586, 595–596 (1978), we upheld against a *Witherspoon* challenge the exclusion of several jurors who were unable to respond affirmatively to the following question:

> "[D]o you feel that you could take an oath to well and truely [*sic*] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

B

We have little difficulty in concluding that this rule applies to the bifurcated procedure employed by Texas in capital cases.[3] This procedure differs from the Illinois statute in effect at the time *Witherspoon* was decided in three principal ways: (1) the *Witherspoon* jury assessed punishment at the same time as it rendered its verdict, whereas in Texas the jury considers punishment in a subsequent penalty proceeding; (2) the *Witherspoon* jury was given unfettered discretion to impose the death sentence or not, whereas the

[3] In *Davis* v. *Georgia*, 429 U. S. 122 (1976), the Court applied the *Witherspoon* doctrine to a case arising under a death penalty scheme similar in some respects to the current Texas system. Petitioner and *amicus* suggest that *Davis* conclusively establishes the applicability of *Witherspoon* to the present case. We do not treat the question as foreclosed, however, because the issue was not explicitly raised in that case.

discretion of a Texas jury is circumscribed by the requirement that it impartially answer the statutory questions; and (3) the *Witherspoon* jury directly imposed the death sentence, whereas Texas juries merely give answers to the statutory questions, which in turn determine the sentence pronounced by the trial judge. Because of these differences, the jury plays a somewhat more limited role in Texas than it did in Illinois. If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.

Nevertheless, jurors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in the automatic imposition of the death penalty, *Hovila* v. *State*, 532 S. W. 2d 293, 294 (Tex. Crim. App. 1975), and each of the jurors whose exclusion is challenged by petitioner was so informed. In essence, Texas juries must be allowed to consider "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths.

With these considerations in mind, it is apparent that a Texas juror's views about the death penalty might influence

the manner in which he performs his role but without exceeding the "guided jury discretion," 577 S. W. 2d, at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*. Exclusions under § 12.31 (b), like other exclusions, must be examined in this light.[4]

C

The State urges that *Witherspoon* and § 12.31 (b) may coexist as separate and independent bases for excluding jurors in Texas and that exclusion under the statute is consistent with the Sixth and Fourteenth Amendments as construed in *Witherspoon*. Brief for Respondent 48. It is the State's position that even if some jurors in the present case were excluded on grounds broader than that permitted under *Witherspoon*, the exclusion was nevertheless proper under § 12.31 (b). The State's argument is consistent with the holdings of decisions in the Texas Court of Criminal Appeals which have considered the relationship between *Witherspoon* and § 12.31 (b).[5] The argument, such as it is, is unpersuasive.

As an initial matter, it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective

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[4] Even the State concedes that *Witherspoon* "applies" to the Texas system. Brief for Respondent 36–48. The State suggests that this proposition is questionable as a matter of "logic," but agrees that Texas experience and case law conclusively demonstrate *Witherspoon*'s applicability. The Texas Court of Criminal Appeals has consistently held that *Witherspoon* is "alive and well" in that State. *E. g.*, *Woodkins* v. *State*, 542 S. W. 2d 855, 862 (1976), cert. denied, 431 U. S. 960 (1977); *Burns* v. *State*, 556 S. W. 2d 270, 275, cert. denied, 434 U. S. 935 (1977); *Brock* v. *State*, 556 S. W. 2d 309, 312, cert. denied, 434 U. S. 1002 (1977); *Whitmore* v. *State*, 570 S. W. 2d 889, 893 (1976).

[5] *E. g.*, *Moore* v. *State*, 542 S. W. 2d 664, 672 (1976), cert. denied, 431 U. S. 949 (1977); *Woodkins* v. *State*, *supra*, at 862; *Shippy* v. *State*, 556 S. W. 2d 246, 251, cert. denied, 434 U. S. 935 (1977); *Burns* v. *State*, *supra*, at 275–276; *Freeman* v. *State*, 556 S. W. 2d 287, 297–298 (1977), cert. denied, 434 U. S. 1088 (1978); *Brock* v. *State*, *supra*, at 313; *Hughes* v. *State*, 562 S. W. 2d 857, 859–861, cert. denied, 439 U. S. 903 (1978); *Hughes* v.

juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon* v. *Illinois*, 391 U. S., at 522, n. 21. While this point may seem too obvious to bear repetition, it is apparent from their frequent references to *Witherspoon* as a ground for "disqualifying" prospective jurors[6] that the State, and the Texas Court of Criminal Appeals, might have fallen into the error of assuming that *Witherspoon* and § 12.31 (b) are both grounds for exclusion, so that there is no conflict if § 12.31 (b) excludes prospective jurors that *Witherspoon* does not.

Nor do we agree with the State's argument that because it has a different origin and purpose § 12.31 (b) cannot and will not lead to exclusions forbidden by *Witherspoon*. Unlike grounds for exclusion having nothing to do with capital punishment, such as personal bias, ill health, financial hardship, or peremptory challenges, § 12.31 (b) focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the *Witherspoon* doctrine. The State could, consistently with *Witherspoon*, use § 12.31 (b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31

State, 563 S. W. 2d 581, 583 (1978), cert. denied, 440 U. S. 950 (1979); *Bodde* v. *State*, 568 S. W. 2d 344, 348–349 (1978), cert. denied, 440 U. S. 968 (1979); *Whitmore* v. *State*, *supra*, at 893; *Garcia* v. *State*, 581 S. W. 2d 168, 174–175 (1979), cert. pending, No. 79–5464; *Burks* v. *State*, 583 S. W. 2d 389, 393–394 (1979), cert. pending, No. 79–5533.

[6] *E. g.*, Brief for Respondent 34, 42, 48; *Moore* v. *State*, *supra*, at 672; *Brock* v. *State*, *supra*, at 313; *Hughes* v. *State*, 562 S. W. 2d, at 860; *Hughes* v. *State*, 563 S. W. 2d, at 586; *Chambers* v. *State*, 568 S. W. 2d 313, 320 (1978), cert. denied, 440 U. S. 928 (1979); *Bodde* v. *State*, *supra*, at 348; *Garcia* v. *State*, *supra*, at 175.

(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible.

Finally, we cannot agree that § 12.31 (b) is "neutral" with respect to the death penalty since under that section the defendant may challenge jurors who state that their views in favor of the death penalty will affect their deliberations on fact issues. Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye," see *Witherspoon* v. *Illinois*, *supra*, at 536 (Black, J., dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon*.

III

Based on our own examination of the record, we have concluded that § 12.31 (b) was applied in this case to exclude prospective jurors on grounds impermissible under *Witherspoon* and related cases. As employed here, the touchstone of the inquiry under § 12.31 (b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emo-

tionally.[7] Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." [8] But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But in the present case Texas has applied § 12.31 (b) to exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not

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[7] Prospective jurors Mahon, Jenson, and Ferguson fell into this category. As Jenson said at one point during his *voir dire* examination:

"Well, I think it probably would [affect my deliberations] because afterall [*sic*], you're talking about a man's life here. You definitely don't want to take it lightly." Tr. of *Voir Dire* 367.

[8] Prospective jurors Coyle, White, McDonald, and Riddle were excluded on this ground.

be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

The judgment of the Texas Court of Criminal Appeals is consequently reversed to the extent that it sustains the imposition of the death penalty.

So ordered.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE BRENNAN, concurring.

Although I join the Court's opinion, I continue to believe that the death penalty is, in all circumstances, contrary to the Eighth Amendment's prohibition against imposition of cruel and unusual punishments. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to believe that the death penalty is, under all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman* v. *Georgia*, 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Godfrey* v. *Georgia*, 446 U. S. 420, 437–440 (1980) (MARSHALL, J., concurring in judgment). In addition, I agree with the Court that the exclusion of veniremen in this case violated the doctrine of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed. Cf.

Beck v. *Alabama*, 447 U. S. 625, 646 (1980) (MARSHALL, J., concurring in judgment). I join in the judgment of the Court.

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds that, under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the State of Texas may not excuse from service on a jury considering a capital case persons who are unwilling or unable to swear that the possibility that the defendant will be executed will not affect their deliberations on any issue of fact. Thus, at a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases, it instead expands that precedent as if those underpinnings had remained wholly static and would benefit from expansion of the holding. I find myself constrained to dissent.

At the time *Witherspoon* was decided, Illinois, like many States, gave the juries in capital cases complete and unbridled discretion in considering the death penalty. In the words of *Witherspoon* itself, "the State of Illinois empowered the jury . . . to answer 'yes' or 'no' to the question whether this defendant was fit to live." 391 U. S., at 521, n. 20. This feature of the capital-sentencing scheme under consideration in that case was perhaps the single most important factor in this Court's ultimate decision:

> "[I]n Illinois . . . the jury is given broad discretion to decide whether or not death *is* "the proper penalty" in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
>
> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard,

'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.*, at 519 (emphasis in original; footnote omitted).

However one feels about the constitutionality of excluding persons with qualms about the death penalty from such a jury, one has to admit that the conditions that formed the predicate for *Witherspoon* no longer exist. Our recent decisions on the constitutionality of the death penalty leave little doubt that, contrary to this Court's only slightly less recent decision in *McGautha* v. *California*, 402 U. S. 183 (1971), a State may not leave the decision whether to impose capital punishment upon a particular defendant solely to the untrammeled discretion of a jury. See *Furman* v. *Georgia*, 408 U. S. 238 (1972); *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976).

The statute presently in force in Texas requires imposition of the death penalty if the jury in a capital case answers three questions in the affirmative:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071 (b) (Vernon Supp. 1979).

If the jury answers any of these inquiries in the negative, capital punishment cannot be imposed.

It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury while at the same time allowing them to consider the particular circumstances of each case—that is, to perform their assigned task at all. In upholding this system against constitutional challenge in *Jurek* v. *Texas, supra,* the opinion announcing the judgment stressed that this procedure "guides and focuses the jury's *objective consideration* of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.,* at 274 (emphasis added). Given this mandate to a jury in a capital case to answer certain specific questions on the basis of the evidence submitted, I see no reason why Texas should not be entitled to require each juror to swear that he or she will answer those questions without regard to their possible cumulative consequences.

In holding otherwise, the Court seems to recognize that the jury's role in this case is fundamentally different from that considered in *Witherspoon.* It nevertheless dismisses this difference on the grounds that the sentencing process employed by Texas "is not an exact science" and that "the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Ante,* at 46. I would suggest that the Court's observations in this regard are as true when applied to the initial determination of guilt as they are when applied to the sentencing proceeding. In either determination, a juror is required to make "unscientific" determinations and to exercise a good deal of discretion within the bounds of his or her oath. In fact, I can see no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase. No one would suggest, however, that jurors could not be excused for cause

if they declined to swear that the possibility of capital punishment would not affect their determination of the defendant's guilt or innocence. Cf. *Witherspoon* v. *Illinois*, 391 U. S., at 523, n. 21 ("Nor . . . does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case").

In his dissent in *Witherspoon*, Mr. Justice Black pointed out that society, as much as the defendant, has a right to an impartial jury. *Id.*, at 535. He also observed that, if a person could not be excluded from a jury for being "too soft" on the death penalty, then a court would be without a basis for excluding someone who was "too hard." As he wrote, "I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against *not* inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of 'an eye for an eye')." *Id.*, at 536 (emphasis added). I cannot believe that the Court would question the excusal of a juror who would not take the challenged oath for those same reasons. To dismiss this possibility, as does the Court here, because "such jurors will be few indeed," *ante*, at 49, is not only to engage in unsupportable speculation, but also to miss the point of Mr. Justice Black's argument. The question is not one of statistical parity, but of logical consistency.

Like the Texas Court of Criminal Appeals, I do not read *Witherspoon* as casting any doubt upon the constitutionality of the oath required by Tex. Penal Code Ann. § 12.31 (b) (1974). See *Hughes* v. *State*, 563 S. W. 2d 581 (1978); *Freeman* v. *State*, 556 S. W. 2d 287 (1977); *Burns* v. *State*, 556 S. W. 2d 270 (1977); *Boulware* v. *State*, 542 S. W. 2d 677 (1976). I therefore would affirm the judgment of the court below.

OHIO *v.* ROBERTS

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 78-756. Argued November 26, 1979—Decided June 25, 1980

At respondent's preliminary hearing in an Ohio state court on charges of forgery of a check in the name of one Bernard Isaacs and of possession of stolen credit cards belonging to Isaacs and his wife, respondent's counsel called as a witness the Isaacs' daughter, who testified that she had permitted respondent to use her apartment for several days while she was away. However, she refused to admit that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Respondent's counsel did not ask to have the witness declared hostile or to place her on cross-examination. At respondent's subsequent criminal trial, he testified that the daughter had given him her parents' checkbook and credit cards with the understanding that he could use them. When the daughter failed to appear at the trial despite the State's having issued five separate subpoenas to her at her parents' residence, the State offered in rebuttal the transcript of her preliminary hearing testimony, relying on an Ohio statute which permits the use of such testimony when the witness "cannot for any reason be produced at the trial." At a *voir dire* hearing on admissibility, conducted after the defense objected to the use of the transcript as violative of the Sixth Amendment's Confrontation Clause, the mother, as the sole witness, testified that the daughter had left home soon after the preliminary hearing; that about a year before the trial a San Francisco social worker had communicated with the parents about the daughter's welfare application filed there; that the last time the daughter telephoned, some seven or eight months before trial, she told her parents that she "was traveling" outside Ohio, but did not reveal where she was; that the mother knew of no way to reach the daughter in case of an emergency; and that she did not know of anybody who knew where the daughter was. The trial court admitted the transcript into evidence, and respondent was convicted. Affirming the Ohio Court of Appeals' reversal of the conviction, the Ohio Supreme Court held that the transcript was inadmissible because the daughter had not been actually cross-examined at the preliminary hearing and was absent at trial, the admission of the transcript thus having violated respondent's confrontation right.

Held: The introduction in evidence at respondent's trial of the daughter's

preliminary hearing testimony was constitutionally permissible. Pp. 62–77.

(a) When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. Cf. *Mancusi* v. *Stubbs*, 408 U. S. 204. Pp. 62–66.

(b) The daughter's prior testimony at the preliminary hearing bore sufficient "indicia of reliability." Cf. *California* v. *Green*, 399 U. S. 149. It need not be decided whether, under *Green*, the mere opportunity to cross-examine satisfies the Confrontation Clause, for defense counsel tested the daughter's testimony with the equivalent of significant cross-examination. His questioning, which was replete with leading questions, clearly partook of cross-examination as a matter of *form* and comported with the principal *purpose* of cross-examination by challenging the daughter's veracity. Regardless of how state law might formally characterize the questioning, it afforded substantial compliance with the purposes behind the confrontation requirement. Nor can this case be distinguished from *Green* merely because the daughter was not personally available for questioning at trial or because respondent had a different lawyer at trial from the one at the preliminary hearing. Moreover, this case does not fall among those in which a particularized search for "indicia of reliability" must be made. Pp. 67–73.

(c) On the facts presented, the trial court and the Ohio Supreme Court correctly concluded that the daughter's unavailability to appear at the trial, in the constitutional sense, was established. Pp. 74–77.

55 Ohio St. 2d 191, 378 N. E. 2d 492, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 77.

John E. Shoop argued the cause and filed a brief for petitioner.

Marvin R. Plasco argued the cause and filed a brief for respondent.*

**Solicitor General McCree, Assistant Attorney General Heymann, Sara*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues concerning the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.

I

Local police arrested respondent, Herschel Roberts, on January 7, 1975, in Lake County, Ohio. Roberts was charged with forgery of a check in the name of Bernard Isaacs, and with possession of stolen credit cards belonging to Isaacs and his wife Amy.

A preliminary hearing was held in Municipal Court on January 10. The prosecution called several witnesses, including Mr. Isaacs. Respondent's appointed counsel had seen the Isaacs' daughter, Anita, in the courthouse hallway, and called her as the defense's only witness. Anita Isaacs testified that she knew respondent, and that she had permitted him to use her apartment for several days while she was away. Defense counsel questioned Anita at some length and attempted to elicit from her an admission that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this. Respondent's attorney did not ask to have the witness declared hostile and did not request permission to place her on cross-examination. The prosecutor did not question Anita.

A county grand jury subsequently indicted respondent for forgery, for receiving stolen property (including the credit cards), and for possession of heroin. The attorney who represented respondent at the preliminary hearing withdrew upon

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Sun Beale, Jerome M. Feit, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

Steven M. Cox filed a brief for the Ohio Public Defenders Association as *amicus curiae* urging affirmance.

becoming a Municipal Court Judge, and new counsel was appointed for Roberts.

Between November 1975 and March 1976, five subpoenas for four different trial dates [1] were issued to Anita at her parents' Ohio residence. The last three carried a written instruction that Anita should "call before appearing." She was not at the residence when these were executed. She did not telephone and she did not appear at trial.

In March 1976, the case went to trial before a jury in the Court of Common Pleas. Respondent took the stand and testified that Anita Isaacs had given him her parents' checkbook and credit cards with the understanding that he could use them. Tr. 231–232. Relying on Ohio Rev. Code Ann. § 2945.49 (1975),[2] which permits the use of preliminary examination testimony of a witness who "cannot for any reason be produced at the trial," the State, on rebuttal, offered the transcript of Anita's testimony. Tr. 273–274.

Asserting a violation of the Confrontation Clause and, indeed, the unconstitutionality thereunder of § 2945.49, the defense objected to the use of the transcript. The trial court conducted a *voir dire* hearing as to its admissibility. Tr. 194–199. Amy Isaacs, the sole witness at *voir dire*, was questioned by both the prosecutor and defense counsel concerning her daughter's whereabouts. Anita, according to her mother, left home for Tucson, Ariz., soon after the prelimi-

[1] A number of continuances were granted for reasons unrelated to Anita's absence.

[2] The statute reads:

"Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony."

nary hearing. About a year before the trial, a San Francisco social worker was in communication with the Isaacs about a welfare application Anita had filed there. Through the social worker, the Isaacs reached their daughter once by telephone. Since then, however, Anita had called her parents only one other time and had not been in touch with her two sisters. When Anita called, some seven or eight months before trial, she told her parents that she "was traveling" outside Ohio, but did not reveal the place from which she called. Mrs. Isaacs stated that she knew of no way to reach Anita in case of an emergency. App. 9. Nor did she "know of anybody who knows where she is." *Id.*, at 11. The trial court admitted the transcript into evidence. Respondent was convicted on all counts.

The Court of Appeals of Ohio reversed. After reviewing the *voir dire*, that court concluded that the prosecution had failed to make a showing of a "good-faith effort" to secure the absent witness' attendance, as required by *Barber* v. *Page*, 390 U. S. 719, 722–725 (1968). The court noted that "we have no witness from the prosecution to testify . . . that no one on behalf of the State could determine Anita's whereabouts, [or] that anyone had exhausted contact with the San Francisco social worker." App. 5. Unavailability would have been established, the court said, "[h]ad the State demonstrated that its subpoenas were never actually served on the witness and that they were unable to make contact in any way with the witness. . . . Until the Isaacs' voir dire, requested by the defense, the State had done nothing, absolutely nothing, to show the Court that Anita would be absent because of unavailability, and they showed no effort having been made to seek out her whereabouts for purpose of trial." *Ibid.*

The Supreme Court of Ohio, by a 4–3 vote, affirmed, but did so on other grounds. 55 Ohio St. 2d 191, 378 N. E. 2d 492 (1978). It first held that the Court of Appeals had erred in concluding that Anita was not unavailable. *Barber* v. *Page* was distinguished as a case in which "the government knew where

the absent witness was," whereas Anita's "whereabouts were entirely unknown." 55 Ohio St. 2d, at 194, 378 N. E. 2d, at 495. "[T]he trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs"; he "could reasonably infer that Anita had left San Francisco"; and he "could properly hold that the witness was unavailable to testify in person." *Id.*, at 195, 378 N. E. 2d, at 495–496.

The court, nonetheless, held that the transcript was inadmissible. Reasoning that normally there is little incentive to cross-examine a witness at a preliminary hearing, where the "ultimate issue" is only probable cause, *id.*, at 196, 378 N. E. 2d, at 496, and citing the dissenting opinion in *California* v. *Green*, 399 U. S. 149, 189 (1970), the court held that the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial. See 55 Ohio St. 2d, at 191, 378 N. E. 2d, at 493 (court syllabus).[3] The court distinguished *Green*, where this Court had ruled admissible the preliminary hearing testimony of a declarant who was present at trial, but claimed forgetfulness. The Ohio court perceived a "dictum" in *Green* that suggested that the mere opportunity to cross-examine renders preliminary hearing testimony admissible. 55 Ohio St. 2d, at 198, and n. 2, 378 N. E. 2d, at 497, and n. 2, citing 399 U. S., at 165–166. But the court concluded that *Green* "goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial." 55 Ohio St. 2d, at 199, 378 N. E. 2d, at 497 (emphasis in original). Since Anita had not been cross-examined at the preliminary hearing and was absent at trial, the introduction of the transcript of her testimony was held to have violated respondent's confrontation

[3] The Ohio "syllabus rule" is stated in *Baltimore & Ohio R. Co.* v. *Baillie*, 112 Ohio St. 567, 570, 148 N. E. 233, 234 (1925). See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 565 (1977).

right. The three dissenting justices would have ruled that "'the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity'" (citing *United States* v. *Allen*, 409 F. 2d 611, 613 (CA10 1969)). 55 Ohio St. 2d, at 200, 378 N. E. 2d, at 498.

We granted certiorari to consider these important issues under the Confrontation Clause. 441 U. S. 904 (1979).

II

A

The Court here is called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions. The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries. See E. Cleary, McCormick on Evidence § 244 (2d ed. 1972) (McCormick) (history of rule); *id.*, §§ 252–324 (exceptions).[4] These exceptions vary among jurisdictions as to number, nature, and detail. See, *e. g.*, Fed. Rules Evid. 803, 804 (over 20 specified exceptions). But every set of exceptions seems to fit an apt description offered more than 40 years ago: "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." Morgan & Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 921 (1937).

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 403–405 (1965); *Davis* v. *Alaska*, 415 U. S. 308, 315 (1974), provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be con-

[4] With the caveat, "[s]implification has a measure of falsification," McCormick defines hearsay evidence as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." § 246, p. 584.

fronted with the witnesses against him." If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895) ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"). But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.

The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. See *California* v. *Green*, 399 U. S., at 156–157, and nn. 9 and 10; see also McCormick § 252, p. 606. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial,[5] and that "a primary interest secured by [the provision] is the right of cross-examination." *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965).[6] In short, the Clause envisions

"a personal examination and cross-examination of the

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[5] See *California* v. *Green*, 399 U. S. 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause"); *id.*, at 172–189 (concurring opinion); *Barber* v. *Page*, 390 U. S. 719, 725 (1968); *Dowdell* v. *United States*, 221 U. S. 325, 330 (1911).

[6] See also *Davis* v. *Alaska*, 415 U. S. 308, 315 (1974); *Bruton* v. *United States*, 391 U. S. 123, 126 (1968); *Pointer* v. *Texas*, 380 U. S. 400, 406–407 (1965); *California* v. *Green*, 399 U. S., at 158 (cross-examination is the "'greatest legal engine ever invented for the discovery of truth,'" quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). Of course, these purposes are interrelated, since one critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the factfinder. See *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 548 (CA3 1967).

Confrontation at trial also operates to ensure reliability in other ways. First, "[t]he requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." 4 J. Weinstein & M. Berger, Weinstein's

> witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U. S., at 242–243.

These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973), quoting *Berger* v. *California*, 393 U. S. 314, 315 (1969).

The Court, however, has recognized that competing interests, if "closely examined," *Chambers* v. *Mississippi*, 410 U. S., at 295, may warrant dispensing with confrontation at trial. See *Mattox* v. *United States*, 156 U. S., at 243 ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934); *California* v. *Green*, 399 U. S., at 171–172 (concurring opinion).

This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity

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Evidence ¶ 800 [01], p. 800–10 (1979). See also Note, 54 Iowa L. Rev. 360, 365 (1968). Second, it "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *California* v. *Green*, 399 U. S., at 158.

of all . . . hearsay 'exceptions.'" *California* v. *Green*, 399 U. S., at 162. But a general approach to the problem is discernible.

B

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *Barber* v. *Page*, 390 U. S. 719 (1968). See also *Motes* v. *United States*, 178 U. S. 458 (1900); *California* v. *Green*, 399 U. S., at 161–162, 165, 167, n. 16.[7]

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder* v. *Massachusetts*, 291 U. S., at 107. The principle recently was formulated in *Mancusi* v. *Stubbs*:

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' *Dutton* v. *Evans*, *supra*, at 89, and to 'afford the trier of fact a satisfactory basis for evaluating

[7] A demonstration of unavailability, however, is not always required. In *Dutton* v. *Evans*, 400 U. S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness. Cf. Read, The New Confrontation—Hearsay Dilemma, 45 S. Cal. L. Rev. 1, 43, 49 (1972); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 194–195, 197–198 (1971).

> the truth of the prior statement,' *California* v. *Green*, *supra*, at 161. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability.'" 408 U. S., at 213.

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." *Mattox* v. *United States*, 156 U. S., at 244.[8] This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U. S., at 155, and "stem from the same roots," *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970). It also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[9]

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[8] See, *e. g.*, *Pointer* v. *Texas*, 380 U. S., at 407 (dying declarations); *Mattox* v. *United States*, 156 U. S., at 243–244 (same); *Mancusi* v. *Stubbs*, 408 U. S. 204, 213–216 (1972) (cross-examined prior-trial testimony); Comment, 30 La. L. Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions").

[9] The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary. Few observers have commented without proposing, roughly or in detail, a basic approach. Some have advanced theories that would shift the general mode of analysis in favor of the criminal defendant. See F. Heller, The Sixth

III

We turn first to that aspect of confrontation analysis deemed dispositive by the Supreme Court of Ohio, and

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Amendment 105 (1951); Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 Geo. Wash. L. Rev. 76, 91–92 (1971) (all hearsay should be excluded except, perhaps, when prosecution shows absolute necessity, high degree of trustworthiness, and "total absence" of motive to falsify); The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 237 (1968); Note, 31 Vand. L. Rev. 682, 694 (1978).

Others have advanced theories that would relax constitutional restrictions on the use of hearsay by the prosecutor. See 5 J. Wigmore, Evidence § 1397, p. 159 (J. Chadbourn rev. 1974); Note, The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, 59 Calif. L. Rev. 580, 594 (1971) ("fixed procedural definition of the confrontation clause makes the actual protection afforded depend upon the particular evidence rules in force in each state"); Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1973); Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185 (1979); Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Texas L. Rev. 151 (1978); Note, 75 Yale L. J. 1434 (1966). See *California* v. *Green*, 399 U. S., at 172–189 (Harlan, J., concurring) (Confrontation Clause requires only that prosecution produce available witnesses; Due Process Clause bars conviction "where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge," *id.*, at 186, n. 20).

Still others have proposed theories that might either help or hurt the accused. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 129 (1972); Baker, The Right to Confrontation, the Hearsay Rules, and Due Process, 6 Conn. L. Rev. 529 (1974); Comment, 13 UCLA L. Rev. 366, 376–377 (1966) (advocating sliding-scale "probative value-need quotient"); Comment, 52 Texas L. Rev. 1167, 1190–1191 (1974).

Finally, a number of commentators, while sometimes criticizing particular results or language in past decisions, have generally agreed with the Court's present approach. See Davenport, The Confrontation Clause and The Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1405 (1972); Read, The New Confrontation-Hearsay Dilemma, 45 S. Cal. L. Rev. 1, 48 (1972) ("the traditional approach . . . with its recognition of a core constitutional value to be preserved, but with its reluctance to make sweeping declarations as to the

answered by it in the negative—whether Anita Isaacs' prior testimony at the preliminary hearing bore sufficient "indicia of reliability." Resolution of this issue requires a careful comparison of this case to *California* v. *Green, supra.*

A

In *Green,* at the preliminary hearing, a youth named Porter identified Green as a drug supplier. When called to the stand at Green's trial, however, Porter professed a lapse of memory. Frustrated in its attempt to adduce live testimony, the prosecution offered Porter's prior statements. The trial judge ruled the evidence admissible, and substantial portions of the preliminary hearing transcript were read to the jury. This Court found no error. Citing the established rule that prior trial testimony is admissible upon retrial if the declarant becomes unavailable, *Mattox* v. *United States,* 156 U. S. 237 (1895); *Mancusi* v. *Stubbs,* 408 U. S. 204 (1972), and recent dicta suggesting the admissibility of preliminary hearing testimony under proper circumstances, *Barber* v. *Page,* 390 U. S., at 725–

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meaning of that right . . . is the best . . . compromise"); Note, 113 U. Pa. L. Rev. 741, 748, and n. 38 (1965) (requiring "adequate substitute for confrontation," while recognizing that no substitute can be "fully adequate"). See also Natali, *Green, Dutton* and *Chambers:* Three Cases in Search of a Theory, 7 Rutgers-Camden L. J. 43, 62 (1975); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 199 (1971).

Notwithstanding this divergence of critical opinion, we have found no commentary suggesting that the Court has misidentified the basic interests to be accommodated. Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment. Convinced that "no rule will perfectly resolve all possible problems," Natali, 7 Rutgers-Camden L. J., at 73, we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative proposals, see *Dutton* v. *Evans,* 400 U. S., at 93–100 (concurring opinion), and *California* v. *Green,* 399 U. S., at 172–189 (concurring opinion); the mutually critical character of the commentary; and the Court's demonstrated success in steering a middle course among proposed alternatives.

726; *Pointer* v. *Texas*, 380 U. S., at 407, the Court rejected Green's Confrontation Clause attack. It reasoned:

> "Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings." 399 U. S., at 165.

These factors, the Court concluded, provided all that the Sixth Amendment demands: "substantial compliance with the purposes behind the confrontation requirement." *Id.*, at 166.[10]

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[10] This reasoning appears in Part III of *Green*, the only section of that opinion directly relevant to the issue raised here. The Ohio court in the present case appears to have dismissed Part III as "dictum." 55 Ohio St. 2d, at 198, 378 N. E. 2d, at 497. The United States has suggested that Part III properly is viewed as an "alternative holding." Brief for United States as *Amicus Curiae* 24, n. 15. Either view, perhaps, would diminish *Green's* precedential significance. We accept neither.

In Part II of *Green*, the Court held that use of a trial witness' prior inconsistent statements as substantive evidence did not, as a general rule, violate the Confrontation Clause. In Part III, the Court went further and held: "Porter's preliminary hearing testimony was admissible . . . wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial." 399 U. S., at 165. In Part IV, the Court returned to the general rule articulated in Part II. The Court contrasted cases in which the declarant testifies at trial that he has forgotten the underlying events, rather than claiming recollection but advancing an inconsistent story. The Court noted that commentators disagreed over whether the former class of cases should be brought within the general rule articulated in Part II. *Id.*, at 169, n. 18. Given the difficulty of the issue, which was neither briefed in this Court nor addressed below, the Court remanded the case for a determination of whether assertedly inconsistent remarks made by Porter to a police

This passage and others in the *Green* opinion suggest that the *opportunity* to cross-examine at the preliminary hearing—even absent actual cross-examination—satisfies the Confrontation Clause. Yet the record showed, and the Court recognized, that defense counsel in fact had cross-examined Porter at the earlier proceeding. *Id.*, at 151. Thus, MR. JUSTICE BRENNAN, writing in dissent, could conclude only that "[p]erhaps" "the mere opportunity for face-to-face encounter [is] sufficient." *Id.*, at 200, n. 8. See Note, 52 Texas L. Rev. 1167, 1170 (1974).

We need not decide whether the Supreme Court of Ohio correctly dismissed statements in *Green* suggesting that the mere opportunity to cross-examine rendered the prior testimony admissible. See Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1211 (1979) (issue is "truly difficult to resolve under conventional theories of confrontation"). Nor need we decide whether *de minimis* questioning is sufficient, for defense counsel in this case tested Anita's testimony with the equivalent of significant cross-examination.

B

Counsel's questioning clearly partook of cross-examination as a matter of *form*. His presentation was replete with leading questions,[11] the principal tool and hallmark of cross-

officer could be admitted under the rule of Part II. Since the critical reason for this disposition was Porter's asserted forgetfulness at trial, the same result clearly would have obtained in regard to Porter's preliminary hearing testimony were it not for the Court's holding in Part III. It follows that Part III was not an alternative holding, and certainly was not dictum. That portion of the opinion alone dispositively established the admissibility of Porter's preliminary hearing testimony. See also Note, 59 Calif. L. Rev., at 589; The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 114–115 (1970).

[11] No less than 17 plainly leading questions were asked, as indicated by phrases in counsel's inquiries: "is[n't] it a fact . . . that"; "is it to your knowledge, then, that . . ."; "is[n't] that correct"; "you never gave them . . ."; "this wasn't then in the pack . . ."; "you have never [not] seen [discussed; talked] . . ."; "you never gave. . . ."

examination. In addition, counsel's questioning comported with the principal *purpose* of cross-examination: to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972). Anita's unwillingness to shift the blame away from respondent became discernible early in her testimony. Yet counsel continued to explore the underlying events in detail. He attempted, for example, to establish that Anita and respondent were sharing an apartment, an assertion that was critical to respondent's defense at trial and that might have suggested ulterior personal reasons for unfairly casting blame on respondent. At another point, he directly challenged Anita's veracity by seeking to have her admit that she had given the credit cards to respondent to obtain a television. When Anita denied this, defense counsel elicited the fact that the only television she owned was a "Twenty Dollar . . . old model." App. 21. Cf. *Davis* v. *Alaska*, 415 U. S. 308, 316–317 (1974).

Respondent argues that, because defense counsel never asked the court to declare Anita hostile, his questioning necessarily occurred on direct examination. See *State* v. *Minneker*, 27 Ohio St. 2d 155, 271 N. E. 2d 821 (1971). But however state law might formally characterize the questioning of Anita, it afforded "substantial compliance with the purposes behind the confrontation requirement," *Green*, 399 U. S., at 166, no less so than classic cross-examination. Although Ohio law may have authorized objection by the prosecutor or intervention by the court, this did not happen. As in *Green*, respondent's counsel was not "significantly limited in any way in the scope or nature of his cross-examination." *Ibid.*

We are also unpersuaded that *Green* is distinguishable on the ground that Anita Isaacs—unlike the declarant Porter in *Green*—was not personally available for questioning *at trial*. This argument ignores the language and logic of *Green*:

> "Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable. . . . That being the case, we do not think a different result should follow where the witness is actually produced." *Id.*, at 165.

Nor does it matter that, unlike Green, respondent had a different lawyer at trial from the one at the preliminary hearing. Although one might strain one's reading of *Green* to assign this factor some significance, respondent advances no reason of substance supporting the distinction. Indeed, if we were to accept this suggestion, *Green* would carry the seeds of its own demise; under a "same attorney" rule, a defendant could nullify the effect of *Green* by obtaining new counsel after the preliminary hearing was concluded.

Finally, we reject respondent's attempt to fall back on general principles of confrontation, and his argument that this case falls among those in which the Court must undertake a particularized search for "indicia of reliability." Under this theory, the factors previously cited—absence of face-to-face contact at trial, presence of a new attorney, and the lack of classic cross-examination—combine with considerations uniquely tied to Anita to mandate exclusion of her statements. Anita, respondent says, had every reason to lie to avoid prosecution or parental reprobation. Her unknown whereabouts is explicable as an effort to avoid punishment, perjury, or self-incrimination. Given these facts, her prior testimony falls on the unreliable side, and should have been excluded.

In making this argument, respondent in effect asks us to disassociate preliminary hearing testimony previously subjected to cross-examination from previously cross-examined

prior-trial testimony, which the Court has deemed generally immune from subsequent confrontation attack. Precedent requires us to decline this invitation. In *Green* the Court found guarantees of trustworthiness in the accouterments of the preliminary hearing itself; there was no mention of the inherent reliability or unreliability of Porter and his story. See also *Mancusi* v. *Stubbs*, 408 U. S., at 216.

In sum, we perceive no reason to resolve the reliability issue differently here than the Court did in *Green*. "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded ' "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." ' " 408 U. S., at 216.[12]

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[12] We need not consider whether defense counsel's questioning at the preliminary hearing surmounts some inevitably nebulous threshold of "effectiveness." In *Mancusi*, to be sure, the Court explored to some extent the adequacy of counsel's cross-examination at the earlier proceeding. See 408 U. S., at 214–215. That discussion, however, must be read in light of the fact that the defendant's representation at the earlier proceeding, provided by counsel who had been appointed only four days prior thereto, already had been held to be ineffective. See *id.*, at 209. Under those unusual circumstances, it was necessary to explore the character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination had been afforded to the defendant. Cf. *Pointer* v. *Texas*, 380 U. S., at 407. We hold that in all but such extraordinary cases, no inquiry into "effectiveness" is required. A holding that every case involving prior testimony requires such an inquiry would frustrate the principal objective of generally validating the prior-testimony exception in the first place—increasing certainty and consistency in the application of the Confrontation Clause.

The statement in *Mancusi* quoted in the text indicates the propriety of this approach. To the same effect is *Mattox* v. *United States*, 156 U. S., at 244 ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination").

IV

Our holding that the Supreme Court of Ohio erred in its "indicia of reliability" analysis does not fully dispose of the case, for respondent would defend the judgment on an alternative ground. The State, he contends, failed to lay a proper predicate for admission of the preliminary hearing transcript by its failure to demonstrate that Anita Isaacs was not available to testify in person at the trial. All the justices of the Supreme Court of Ohio rejected this argument. 55 Ohio St. 2d, at 195 and 199, 378 N. E. 2d, at 495 and 497.

A

The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Barber* v. *Page*, 390 U. S., at 724–725 (emphasis added). Accord, *Mancusi* v. *Stubbs*, *supra*; *California* v. *Green*, 399 U. S., at 161–162, 165, 167, n. 16; *Berger* v. *California*, 393 U. S. 314 (1969).

Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *California* v. *Green*, 399 U. S., at 189, n. 22 (concurring opinion, citing *Barber* v. *Page*, *supra*). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evi-

dentiary proponents, the prosecution bears the burden of establishing this predicate.

B

On the facts presented we hold that the trial court and the Supreme Court of Ohio correctly concluded that Anita's unavailability, in the constitutional sense, was established.

At the *voir dire* hearing, called for by the defense, it was shown that some four months prior to the trial the prosecutor was in touch with Amy Isaacs and discussed with her Anita's whereabouts. It may appropriately be inferred that Mrs. Isaacs told the prosecutor essentially the same facts to which she testified at *voir dire:* that the Isaacs had last heard from Anita during the preceding summer; that she was not then in San Francisco, but was traveling outside Ohio; and that the Isaacs and their other children knew of no way to reach Anita even in an emergency. This last fact takes on added significance when it is recalled that Anita's parents earlier had undertaken affirmative efforts to reach their daughter when the social worker's inquiry came in from San Francisco. This is not a case of parents abandoning all interest in an absent daughter.

The evidence of record demonstrates that the prosecutor issued a subpoena to Anita at her parents' home, not only once, but on five separate occasions over a period of several months. In addition, at the *voir dire* argument, the prosecutor stated to the court that respondent "witnessed that I have attempted to locate, I have subpoenaed, there has been a *voir dire* of the witness' parents, and they have not been able to locate her for over a year." App. 12.

Given these facts, the prosecution did not breach its duty of good-faith effort. To be sure, the prosecutor might have tried to locate by telephone the San Francisco social worker with whom Mrs. Isaacs had spoken many months before and might have undertaken other steps in an effort to find Anita. One, in hindsight, may always think of other things. Never-

theless, the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution. We accept as a general rule, of course, the proposition that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Barber* v. *Page*, 390 U. S., at 724, quoting from the dissenting opinion in that case in the Court of Appeals (381 F. 2d 479, 481 (CA10 1966)). But the service and ineffectiveness of the five subpoenas and the conversation with Anita's mother were far more than mere reluctance to face the possibility of a refusal. It was investigation at the last-known real address, and it was conversation with a parent who was concerned about her daughter's whereabouts.

Barber and *Mancusi* v. *Stubbs*, *supra*, are the cases in which this Court has explored the issue of constitutional unavailability. Although each is factually distinguishable from this case, *Mancusi* provides significant support for a conclusion of good-faith effort here,[13] and *Barber* has no contrary significance. Insofar as this record discloses no basis for concluding that Anita was abroad, the case is factually weaker than *Mancusi;* but it is stronger than *Mancusi* in the sense that the Ohio prosecutor, unlike the prosecutor in *Mancusi*, had no clear indication, if any at all, of Anita's whereabouts. In *Barber*, the Court found an absence of good-faith effort where

[13] In *Mancusi*, the declarant "who had been born in Sweden but had become a naturalized American citizen, had returned to Sweden and taken up permanent residence there." 408 U. S., at 209. While in this country, he had testified against Stubbs at his Tennessee trial for murder and kidnaping. Stubbs was convicted, but obtained habeas corpus relief 10 years later, and was retried by Tennessee. Before the second trial, the prosecution sent a subpoena to be served in Texas, the declarant's last place of residence in this country. It could not be served. The Court rejected Stubbs' assertion that the prosecution had not undertaken good-faith efforts in failing to do more. "Tennessee . . . was powerless to compel his attendance . . . either through its own process or through established procedures." *Id.*, at 212.

the prosecution made no attempt to secure the presence of a declarant incarcerated in a federal penitentiary in a neighboring State. There, the prosecution knew where the witness was, procedures existed whereby the witness could be brought to the trial, and the witness was not in a position to frustrate efforts to secure his production. Here, Anita's whereabouts were not known, and there was no assurance that she would be found in a place from which she could be forced to return to Ohio.

We conclude that the prosecution carried its burden of demonstrating that Anita was constitutionally unavailable for purposes of respondent's trial.

The judgment of the Supreme Court of Ohio is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Court concludes that because Anita Isaacs' testimony at respondent's preliminary hearing was subjected to the equivalent of significant cross-examination, such hearsay evidence bore sufficient "indicia of reliability" to permit its introduction at respondent's trial without offending the Confrontation Clause of the Sixth Amendment. As the Court recognizes, however, the Constitution imposes the threshold requirement that the prosecution must demonstrate the unavailability of the witness whose prerecorded testimony it wishes to use against the defendant. Because I cannot agree that the State has met its burden of establishing this predicate, I dissent.[1]

[1] Because I am convinced that the State failed to lay a proper foundation for the admission of Anita Isaacs' preliminary hearing testimony, I have no occasion to consider whether that testimony had in fact been subjected to full and effective adverse questioning and whether, even conceding the adequacy of the prior cross-examination, the significant dif-

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U. S. 400, 405 (1965). Accord, *Berger* v. *California*, 393 U. S. 314, 315 (1969); *Barber* v. *Page*, 390 U. S. 719, 721 (1968); *Pointer* v. *Texas*, *supra*, at 410 (STEWART, J., concurring); *Kirby* v. *United States*, 174 U. S. 47, 55–56 (1899). Historically, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge his accusers in a direct encounter before the trier of fact. See *California* v. *Green*, 399 U. S. 149, 156–158 (1970); *Park* v. *Huff*, 506 F. 2d 849, 861–862 (CA5 1975) (Gewin, J., concurring). At the heart of this constitutional guarantee is the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895). See also *California* v. *Green*, *supra*, at 174–183 (Harlan, J., concurring).

Despite the literal language of the Sixth Amendment,[2] our cases have recognized the necessity for a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. In keeping with the importance of this provision in our constitutional scheme, however, we have imposed a heavy burden on the prosecution either to secure the presence of the witness or to

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ferences in the nature and objectives of the preliminary hearing and the trial preclude substituting confrontation at the former proceeding for the constitutional requirement of confrontation at the latter. See *California* v. *Green*, 399 U. S. 149, 195–203 (1970) (BRENNAN, J., dissenting).

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

demonstrate the impossibility of that endeavor. *Barber* v. *Page, supra,* held that the absence of a witness from the jurisdiction does not excuse the State's failure to attempt to compel the witness' attendance at trial; in such circumstances, the government must show that it has engaged in a diligent effort to locate and procure the witness' return. "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.,* at 724–725. See, *e. g., United States* v. *Mann,* 590 F. 2d 361, 367 (CA1 1978); *United States* v. *Lynch,* 163 U. S. App. D. C. 6, 18–19, 499 F. 2d 1011, 1023–1024 (1974); *Government of the Virgin Islands* v. *Aquino,* 378 F. 2d 540, 549–552 (CA3 1967). See generally 5 J. Wigmore, Evidence § 1405 (J. Chadbourn rev. 1974) and cases cited therein.

In the present case, I am simply unable to conclude that the prosecution met its burden of establishing Anita Isaacs' unavailability. From all that appears in the record—and there has been no suggestion that the record is incomplete in this respect—the State's *total* effort to secure Anita's attendance at respondent's trial consisted of the delivery of five subpoenas in her name to her parents' residence, and three of those were issued after the authorities had learned that she was no longer living there.[3] At least four months before the trial began, the prosecution was aware that Anita had moved away; yet during that entire interval it did nothing whatsoever to try to make contact with her. It is difficult to believe that the State would have been so derelict in attempting to secure the witness' presence at trial had it not had her

[3] The five subpoenas, all of which were issued to Anita at her parents' address, showed that returns were made on November 3 and 4, 1975, December 10, 1975, February 3, 1976, and February 25, 1976, respectively. During the course of the *voir dire* of Anita's mother, the prosecutor indicated that sometime in November 1975 the Isaacs had told him that Anita had left home. See Tr. 197; *ante,* at 75.

favorable preliminary hearing testimony upon which to rely in the event of her "unavailability." The perfunctory steps which the State took in this case can hardly qualify as a "good-faith effort." In point of fact, it was no effort at all.

The Court, however, is apparently willing to excuse the prosecution's inaction on the ground that any endeavor to locate Anita Isaacs was unlikely to bear fruit. See *ante*, at 75–76. I not only take issue with the premise underlying that reasoning—that the improbability of success can condone a refusal to conduct even a cursory investigation into the witness' whereabouts—but I also seriously question the Court's conclusion that a bona fide search in the present case would inevitably have come to naught.

Surely the prosecution's mere speculation about the difficulty of locating Anita Isaacs cannot relieve it of the obligation to attempt to find her. Although the rigor of the undertaking might serve to palliate a failure to prevail, it cannot justify a failure even to try. Just as *Barber* cautioned that "'the possibility of a refusal is not the equivalent of asking and receiving a rebuff,'" 390 U. S., at 724 (quoting the decision below, 381 F. 2d 479, 481 (CA10 1966) (Aldrich, J., dissenting)), so, too, the possibility of a defeat is not the equivalent of pursuing all obvious leads and returning empty-handed. The duty of "good-faith effort" would be meaningless indeed "if that effort were required only in circumstances where success was guaranteed." *Mancusi* v. *Stubbs*, 408 U. S. 204, 223 (1972) (MARSHALL, J., dissenting).

Nor do I concur in the Court's bleak prognosis of the likelihood of procuring Anita Isaacs' attendance at respondent's trial.[4] Although Anita's mother testified that she had no

[4] In attempting to distinguish this case from *Barber* v. *Page*, 390 U. S. 719 (1968), and demonstrate the reasonableness of the State's conduct, the Court states that "there was no assurance that [Anita] would be found in a place from which she could be forced to return to Ohio." *Ante*, at 77. Once located, however, it is extremely unlikely that Anita could have resisted the State's efforts to secure her return. The Uniform

current knowledge of her daughter's whereabouts, the prosecution possessed sufficient information upon which it could have at least initiated an investigation. As the Court acknowledges, one especially promising lead was the San Francisco social worker to whom Mrs. Isaacs had spoken and with whom Anita had filed for welfare. What the Court fails to mention, however, is that the prosecution had more to go on than that datum alone. For example, Mrs. Isaacs testified that on the same day she talked to the social worker, she also spoke to her daughter. And although Mrs. Isaacs told defense counsel that she knew of no way to get in touch with her daughter in an emergency, Tr. 195, in response to a similar question from the prosecutor she indicated that someone in Tucson might be able to contact Anita. *Id.*, at 198–199. It would serve no purpose here to essay an exhaustive catalog of the numerous measures the State could have taken in a diligent attempt to locate Anita. It suffices simply to note that it is not "hindsight," see *ante*, at 75, that permits us to envision how a skilled investigator armed with this information (and any additional facts not brought out through the *voir dire*) [5] might have discovered Anita's whereabouts

Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings enables prosecuting authorities in one State to obtain an order from a court in another State compelling the witness' appearance to testify in court in the first State. The Uniform Act has been adopted in the District of Columbia, the Panama Canal Zone, Puerto Rico, the Virgin Islands, and every State in the Union except Alabama. 11 U. L. A. 1 (Supp. 1980).

[5] The Court of Appeals of Ohio expressed some doubt as to whether Mrs. Isaacs had been totally forthcoming in professing no knowledge of the whereabouts of her daughter, who had been linked to respondent's criminal involvements and who, in Mrs. Isaacs' words, "wants to make her own way, and forget all the unpleasantness that happened here, and prove something to herself and to us, and to think about her future and forget her past." Tr. 195–196. See App. 5–6. These reservations about the candidness of Mrs. Isaacs' testimony provide yet another reason why the State was not justified in relying solely on the Isaacs' representations to establish Anita's unavailability.

with reasonable effort. Indeed, precisely because the prosecution did absolutely nothing to try to locate Anita, hindsight does not enhance the vista of investigatory opportunities that were available to the State had it actually attempted to find her.

In sum, what the Court said in *Barber* v. *Page*, 390 U. S., at 725, is equally germane here: "[S]o far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek [her] presence. The right of confrontation may not be dispensed with so lightly."

Syllabus

UNITED STATES *v.* SALVUCCI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79-244. Argued March 26, 1980—Decided June 25, 1980

Respondents were charged with unlawful possession of stolen mail. The checks that formed the basis of the indictment had been seized by police during a search, conducted pursuant to a warrant, of an apartment rented by one respondent's mother. Respondents moved to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to show probable cause. The District Court granted the motion. The Court of Appeals affirmed, holding, in reliance on *Jones* v. *United States*, 362 U. S. 257, that since respondents were charged with crimes of possession, they were entitled to claim "automatic standing" to challenge the legality of the search without regard to whether they had an expectation of privacy in the premises searched.

Held: Defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. *Jones* v. *United States*, *supra*, overruled. Pp. 86-95.

(a) The "dilemma" identified in *Jones* (and given as one of the two reasons for establishing the "automatic standing" rule as an exception to the exclusionary rule) that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt, was eliminated by *Simmons* v. *United States*, 390 U. S. 377, wherein it was held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. Pp. 89-90.

(b) The second reason given in *Jones* for the "automatic standing" rule that such rule would prevent the "vice of prosecutorial self-contradiction" whereby the Government would assert that the defendant possessed the goods in question for purposes of criminal liability while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment, has likewise been eroded. It is now the rule that a prosecutor, without legal contradiction, may simultaneously maintain that a defendant criminally possessed the seized goods but was not subject to a Fourth Amendment deprivation.

Rakas v. *Illinois*, 439 U. S. 128. The underlying assumption for such "vice of prosecutorial self-contradiction" that possession of seized goods is the equivalent of Fourth Amendment "standing" to challenge the search creates too broad a gauge for measurement of Fourth Amendment rights. Rather, it must be asked not merely whether the defendant has a possessory interest in the items seized but also whether he had an expectation of privacy in the area searched. Pp. 90–93.

(c) The issue whether the prosecutor, although not permitted under *Simmons* v. *United States*, *supra*, to use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial, may still be permitted to use such testimony to impeach the defendant at trial, need not be resolved here, since it is an issue that more aptly relates to the proper breadth of the *Simmons* privilege and not to the need for retaining automatic standing. Pp. 93–94.

(d) Respondents' argument that the "automatic standing" rule should be retained since it maximizes the deterrence of illegal police conduct by permitting an expanded class of potential challengers, is without merit. Pp. 94–95.

599 F. 2d 1094, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 95.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General McCree*, *Assistant Attorney General Heymann*, and *Deputy Solicitor General Frey*.

Willie J. Davis, by appointment of the Court, 444 U. S. 1067, argued the cause and filed a brief for respondent Salvucci. *John C. McBride*, by appointment of the Court, 444 U. S. 1067, argued the cause and filed a brief for respondent Zackular.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Relying on *Jones* v. *United States*, 362 U. S. 257 (1960), the Court of Appeals for the First Circuit held that since respondents were charged with crimes of possession, they were

entitled to claim "automatic standing" to challenge the legality of the search which produced the evidence against them, without regard to whether they had an expectation of privacy in the premises searched. 599 F. 2d 1094 (1979). Today we hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. The automatic standing rule of *Jones* v. *United States, supra,* is therefore overruled.

I

Respondents, John Salvucci and Joseph Zackular, were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U. S. C. § 1708. The 12 checks which formed the basis of the indictment had been seized by the Massachusetts police during the search of an apartment rented by respondent Zackular's mother. The search was conducted pursuant to a warrant.

Respondents filed a motion to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to demonstrate probable cause. The District Court granted respondents' motions and ordered that the checks be suppressed.[1] The Government sought reconsideration of the District Court's ruling, contending that respondents lacked "standing" to challenge the constitutionality of the search. The District Court reaffirmed its suppression order and the Government appealed.

The Court of Appeals affirmed, holding that respondents had "standing" and the search warrant was constitutionally inadequate. The court found that the respondents were not required to establish a legitimate expectation of privacy in the premises searched or the property seized because they were entitled to assert "automatic standing" to object to the search

[1] The District Court held that the affidavit was deficient because the affiant relied on double hearsay, and failed to specify the dates on which information included in the affidavit had been obtained.

and seizure under *Jones* v. *United States, supra.* The court observed that the vitality of the *Jones* doctrine had been challenged in recent years, but that "[u]ntil the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been . . . overruled. . . . That is an issue which the Supreme Court must resolve." 599 F. 2d, at 1098. The Court of Appeals was obviously correct in its characterization of the status of *Jones,* and we granted certiorari in order to resolve the controversy.[2] 444 U. S. 989 (1979).

II

As early as 1907, this Court took the position that remedies for violations of constitutional rights would only be afforded to a person who "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon,* 204 U. S. 152, 160. The exclusionary rule is one form of remedy afforded for Fourth Amendment violations, and the Court in *Jones* v. *United States* held that the *Hatch* v. *Reardon* principle properly limited its availability. The Court reasoned that ordinarily "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy." 362 U. S., at 261. Subsequent attempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected by this Court. *Alderman* v. *United States,* 394 U. S. 165, 174 (1969); *Brown* v. *United States,* 411 U. S.

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[2] The Courts of Appeals have divided on the continued applicability of the automatic standing rule. The Sixth Circuit abandoned the rule after our decision in *Simmons* v. *United States,* 390 U. S. 377 (1968). See, *e. g., United States* v. *Hunter,* 550 F. 2d 1066 (1977). Most of the remaining Circuits appear to have retained the rule, but many with "misgivings." See, *e. g., United States* v. *Oates,* 560 F. 2d 45, 52 (CA2 1977); *United States* v. *Edwards,* 577 F. 2d 883, 892 (CA5), cert. denied, 439 U. S. 968 (1978).

223, 230 (1973). Most recently, in *Rakas* v. *Illinois*, 439 U. S. 128 (1978), we held that "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections." *Id.*, at 134.

Even though the Court in *Jones* recognized that the exclusionary rule should only be available to protect defendants who have been the victims of an illegal search or seizure, the Court thought it necessary to establish an exception. In cases where possession of the seized evidence was an essential element of the offense charged, the Court held that the defendant was not obligated to establish that his own Fourth Amendment rights had been violated, but only that the search and seizure of the evidence was unconstitutional.[3] Upon such a showing, the exclusionary rule would be available to prevent the admission of the evidence against the defendant.

The Court found that the prosecution of such possessory offenses presented a "special problem" which necessitated the departure from the then settled principles of Fourth Amendment "standing."[4] Two circumstances were found to require this exception. First, the Court found that in order to establish standing at a hearing on a motion to suppress, the defendant would often be "forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him," since several Courts of Appeals had "pinioned a defendant within this dilemma" by holding that evidence adduced at the motion

[3] In *Brown* v. *United States*, 411 U. S. 223, 229 (1973), this Court clarified that the automatic standing rule of *Jones* was applicable only where the offense charged "possession of the seized evidence at the time of the contested search and seizure."

[4] In *Rakas*, this Court discarded reliance on concepts of "standing" in determining whether a defendant is entitled to claim the protections of the exclusionary rule. The inquiry, after *Rakas*, is simply whether the defendant's rights were violated by the allegedly illegal search or seizure. Because *Jones* was decided at a time when "standing" was designated as a separate inquiry, we use that term for the purposes of re-examining that opinion.

to suppress could be used against the defendant at trial. 362 U. S., at 262. The Court declined to embrace any rule which would require a defendant to assert his Fourth Amendment claims only at the risk of providing the prosecution with self-incriminating statements admissible at trial. The Court sought resolution of this dilemma by relieving the defendant of the obligation of establishing that his Fourth Amendment rights were violated by an illegal search or seizure.

The Court also commented that this rule would be beneficial for a second reason. Without a rule prohibiting a Government challenge to a defendant's "standing" to invoke the exclusionary rule in a possessory offense prosecution, the Government would be allowed the "advantage of contradictory positions." *Id.*, at 263. The Court reasoned that the Government ought not to be allowed to assert that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment. The Court found that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." *Id.*, at 263–264. Thus in order to prevent both the risk that self-incrimination would attach to the assertion of Fourth Amendment rights, as well as to prevent the "vice of prosecutorial self-contradiction," see *Brown* v. *United States*, *supra*, at 229, the Court adopted the rule of "automatic standing."

In the 20 years which have lapsed since the Court's decision in *Jones*, the two reasons which led the Court to the rule of automatic standing have likewise been affected by time. This Court has held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. *Simmons* v. *United States*, 390 U. S. 377 (1968). Developments in the principles of Fourth Amendment standing, as well, clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant

charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure. We are convinced not only that the original tenets of the *Jones* decision have eroded, but also that no alternative principles exist to support retention of the rule.

A

The "dilemma" identified in *Jones*, that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt, was eliminated by our decision in *Simmons* v. *United States*, *supra*. In *Simmons*, the defendant Garrett was charged with bank robbery. During the search of a codefendant's mother's house, physical evidence used in the bank robbery, including a suitcase, was found in the basement and seized. In an effort to establish his standing to assert the illegality of the search, Garrett testified at the suppression hearing that the suitcase was similar to one he owned and that he was the owner of the clothing discovered inside the suitcase. Garrett's motion to suppress was denied, but his testimony was admitted into evidence against him as part of the Government's case-in-chief at trial. This Court reversed, finding that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." 390 U. S., at 392–393. The Court found that, in effect, the defendant was

> "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment

grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*, at 394.

This Court's ruling in *Simmons* thus not only extends protection against this risk of self-incrimination in all of the cases covered by *Jones*, but also grants a form of "use immunity" to those defendants charged with nonpossessory crimes. In this respect, the protection of *Simmons* is therefore broader than that of *Jones*. Thus, as we stated in *Brown* v. *United States*, 411 U. S., at 228, "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]."

B

This Court has identified the self-incrimination rationale as the cornerstone of the *Jones* opinion. See *Brown* v. *United States*, *supra*, at 228. We need not belabor the question of whether the "vice" of prosecutorial contradiction could alone support a rule countenancing the exclusion of probative evidence on the grounds that someone other than the defendant was denied a Fourth Amendment right. The simple answer is that the decisions of this Court, especially our most recent decision in *Rakas* v. *Illinois*, 439 U. S. 128 (1978), clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction. To conclude that a prosecutor engaged in self-contradiction in *Jones*, the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so.[5]

[5] Respondent Salvucci cites this Court's decision in *United States* v. *Jeffers*, 342 U. S. 48 (1951), as support for the view that legal ownership

The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation.[6] As we hold today in *Rawlings* v. *Kentucky*, *post*, p. 98, legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest. This Court has repeatedly repudiated the notion that "arcane distinctions developed in property and tort law" ought to control our Fourth Amendment inquiry. *Rakas* v. *Illinois*, *supra*, at 143. In another section of the opinion in *Jones* itself, the Court concluded that, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law. . . ." 362 U. S., at 266. See also *Mancusi* v. *DeForte*, 392 U. S. 364 (1968); *Warden* v. *Hayden*, 387 U. S. 294 (1967).

While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, see *Rakas*, *supra*, at 144, n. 12, property rights are neither the beginning nor the end of this Court's inquiry. In *Rakas*, this Court held that an illegal search only violates the rights of those who have "a legitimate

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of the seized good was sufficient to confer Fourth Amendment "standing." In *Rakas*, however, we stated that "[s]tanding in *Jeffers* was based on Jeffers' possessory interest in *both* the premises searched and the property seized." 439 U. S., at 136. (Emphasis added.)

[6] Legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal. See, *e. g.*, *United States* v. *Lisk*, 522 F. 2d 228 (CA7 1975) (Stevens, J.), cert. denied, 423 U. S. 1078 (1976), although in that case the property was ultimately found not to have been illegally seized. We need not explore this issue since respondents did not challenge the constitutionality of the seizure of the evidence.

expectation of privacy in the invaded place." 439 U. S., at 140. See also *Mancusi* v. *DeForte, supra.*

We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched. In *Jones,* the Court held not only that automatic standing should be conferred on defendants charged with crimes of possession, but, alternatively, that Jones had actual standing because he was "legitimately on the premises" at the time of the search. In *Rakas,* this Court rejected the adequacy of this second *Jones* standard, finding that it was "too broad a gauge for measurement of Fourth Amendment rights." 439 U. S., at 142. In language appropriate to our consideration of the automatic standing rule as well, we reasoned:

> "In abandoning 'legitimately on premises' for the doctrine that we announce today, we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment. Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so. . . . We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling." *Id.,* at 147–148.

As in *Rakas,* we again reject "blind adherence" to the other underlying assumption in *Jones* that possession of the seized good is an acceptable measure of Fourth Amendment interests. As in *Rakas,* we find that the *Jones* standard "creates too

broad a gauge for measurement of Fourth Amendment rights" and that we must instead engage in a "conscientious effort to apply the Fourth Amendment" by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched. Thus neither prosecutorial "vice," nor the underlying assumption of *Jones* that possession of a seized good is the equivalent of Fourth Amendment "standing" to challenge the search, can save the automatic standing rule.

C

Even though the original foundations of *Jones* are no longer relevant, respondents assert that principles not articulated by the Court in *Jones* support retention of the rule. First, respondents maintain that while *Simmons* v. *United States*, 390 U. S. 377 (1968), eliminated the possibility that the prosecutor could use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial, *Simmons* did not eliminate other risks to the defendant which attach to giving testimony on a motion to suppress.[7] Principally, respondents assert that the prosecutor may still be permitted to use the defendant's testimony to impeach him at trial.[8] This Court

[7] The respondents argue that the prosecutor's access to the suppression testimony will unfairly provide the prosecutor with information advantageous to the preparation of his case and trial strategy. This argument, however, is surely applicable equally to possessory and nonpossessory offenses. This Court has clearly declined to expand the *Jones* rule to other classes of offenses, *Alderman* v. *United States*, 394 U. S. 165 (1969); *Brown* v. *United States*, 411 U. S. 223 (1973), and thus respondents' rationale cannot support the retention of a special rule of automatic standing here.

[8] A number of courts considering the question have held that such testimony is admissible as evidence of impeachment. *Gray* v. *State*, 43 Md. App. 238, 403 A. 2d 853 (1979); *People* v. *Douglas*, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); *People* v. *Sturgis*, 58 Ill. 2d 211, 317 N. E. 2d 545 (1974). See also *Woody* v. *United States*, 126 U. S. App. D. C. 353, 354–355, 379 F. 2d 130, 131–132 (Burger, J.), cert. denied, 389 U. S. 961 (1967).

has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial.[9] But the issue presented here is quite different from the one of whether "use immunity" extends only through the Government's case-in-chief, or beyond that to the direct and cross-examination of a defendant in the event he chooses to take the stand. That issue need not be and is not resolved here, for it is an issue which more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing.

Respondents also seek to retain the *Jones* rule on the grounds that it is said to maximize the deterrence of illegal police conduct by permitting an expanded class of potential challengers. The same argument has been rejected by this Court as a sufficient basis for allowing persons whose Fourth Amendment rights were not violated to nevertheless claim the benefits of the exclusionary rule. In *Alderman* v. *United States*, 394 U. S., at 174–175, we explicitly stated:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

See also *Rakas* v. *Illinois*, 439 U. S., at 137; *United States* v. *Ceccolini*, 435 U. S. 268, 275–276 (1978); *United States* v. *Calandra*, 414 U. S. 338, 350–351 (1974). Respondents' de-

[9] This Court has held that "the protective shield of *Simmons* is not to be converted into a license for false representations. . . ." *United States* v. *Kahan*, 415 U. S. 239, 243 (1974).

terrence argument carries no special force in the context of possessory offenses and we therefore again reject it.

We are convinced that the automatic standing rule of *Jones* has outlived its usefulness in this Court's Fourth Amendment jurisprudence. The doctrine now serves only to afford a windfall to defendants whose Fourth Amendment rights have *not* been violated. We are unwilling to tolerate the exclusion of probative evidence under such circumstances since we adhere to the view of *Alderman* that the values of the Fourth Amendment are preserved by a rule which limits the availability of the exclusionary rule to defendants who have been subjected to a violation of their Fourth Amendment rights.

This action comes to us as a challenge to a pretrial decision suppressing evidence. The respondents relied on automatic standing and did not attempt to establish that they had a legitimate expectation of privacy in the areas of Zackular's mother's home where the goods were seized. We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated. See *Combs* v. *United States*, 408 U. S. 224 (1972).

Reversed and remanded.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court overrules the "automatic standing" rule of *Jones* v. *United States*, 362 U. S. 257 (1960), because it concludes that the rationale underpinning the rule has been "eroded," *ante*, at 89. I do not share that view.

A defendant charged with a possessory offense who moves to suppress the items he is charged with possessing must now establish at the suppression hearing that the police conduct of which he complains violated his personal Fourth Amendment rights. In many cases, a defendant will be able to make the required showing only by taking the stand and testifying about his interest in the place searched and the evidence

seized; the need for the defendant's own testimony may, in fact, be more likely to arise in possession cases than in cases involving other types of offenses. The holding in *Jones* was premised, in part, on the unfairness of "pinion[ing] a defendant within th[e] dilemma," 362 U. S., at 262, of being able to assert his Fourth Amendment claim only by relinquishing his Fifth Amendment privilege against self-incrimination. The Court finds that this dilemma no longer exists because *Simmons* v. *United States*, 390 U. S. 377 (1968), held that testimony given by a defendant in support of a motion to suppress "may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*, at 394.

I cannot agree that *Simmons* provides complete protection against the "self-incrimination dilemma," *Brown* v. *United States*, 411 U. S. 223, 228 (1973). Respondents contend that the testimony given at the suppression hearing might be held admissible for impeachment purposes and, while acknowledging that that question is not before us in this case, the majority broadly hints that this is so. *Ante*, at 94, n. 9; see *Harris* v. *New York*, 401 U. S. 222 (1971); *United States* v. *Kahan*, 415 U. S. 239 (1974); *United States* v. *Havens*, 446 U. S. 620 (1980); *Jenkins* v. *Anderson*, 447 U. S. 231 (1980); but see *New Jersey* v. *Portash*, 440 U. S. 450 (1979). The use of the testimony for impeachment purposes would subject a defendant to precisely the same dilemma, unless he was prepared to relinquish his constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims. One of the purposes of *Jones* and *Simmons* was to remove such obstacles. See *Simmons*, *supra*, at 392–394. Moreover, the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination to establish the requisite Fourth Amendment interest. Even if such information could not be introduced at the subsequent trial, it might be helpful to the prosecution in developing its case or deciding its trial strategy. The fur-

nishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim. *Simmons,* therefore, does not eliminate the possibility that a defendant will be deterred from presenting a Fourth Amendment claim because of "the risk that the words which he utters may later be used to incriminate him." *Simmons, supra,* at 393. Accordingly, I conclude that this part of the reasoning in *Jones* remains viable.

A second ground for relieving the defendant charged with possession from the necessity of showing "an interest in the premises searched or the property seized" was that "to hold to the contrary . . . would be to permit the Government to have the advantage of contradictory positions as a basis for conviction," *Jones,* 362 U. S., at 263. That is, since "possession both convicts and confers standing," *ibid.,* the Government, which had charged the defendant with possession, would not be permitted to deny that he had standing. By holding today in *Rawlings* v. *Kentucky, post,* p. 98, that a person may assert a Fourth Amendment claim only if he has a privacy interest in the area that was searched, the Court has, to be sure, done away with that logical inconsistency. For reasons stated in my dissenting opinion in that case, I believe that holding is diametrically opposed to the meaning of the Fourth Amendment as it has always been understood.

In sum, I find neither of the Court's grounds for abandoning *Jones* persuasive. The automatic standing rule is a salutary one which protects the rights of defendants and eliminates the wasteful requirement of making a preliminary showing of standing in pretrial proceedings involving possessory offenses, where the charge itself alleges an interest sufficient to support a Fourth Amendment claim. I dissent.

RAWLINGS *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 79-5146. Argued March 26, 1980—Decided June 25, 1980

When police officers, armed with a warrant to arrest one Marquess, arrived at his house, another resident of the house and four visitors, including petitioner, were there. While searching the house unsuccessfully for Marquess, several officers smelled marihuana smoke and saw marihuana seeds. Two of the officers left to obtain a warrant to search the house, and the other officers detained the occupants, allowing them to leave only if they consented to a body search. About 45 minutes later, the officers returned with the search warrant; the warrant was read to the remaining occupants, including petitioner, and they were also given *"Miranda"* warnings; and one Cox, an occupant, was ordered to empty her purse, which contained drugs that were controlled substances under Kentucky law. Cox told petitioner, who was standing nearby in response to an officer's command, "to take what was his," and petitioner immediately claimed ownership of the drugs. At that time, an officer searched petitioner, finding $4,500 in cash and a knife, and petitioner was then formally arrested. Petitioner was indicted for possessing with intent to sell the controlled substances recovered from Cox's purse, and the Kentucky trial court denied petitioner's motion to suppress, as fruits of an illegal detention and illegal searches, the drugs, the money, and the statements made by him when the police discovered the drugs. Petitioner's conviction was affirmed by the Kentucky Court of Appeals, and the Kentucky Supreme Court in turn affirmed, holding that petitioner had no "standing" to contest the search of Cox's purse because he had no legitimate or reasonable expectation of freedom from governmental intrusion into the purse, and that the search uncovering the money in petitioner's pocket was justifiable as incident to a lawful arrest based on probable cause.

Held:

1. The conclusion that petitioner did not sustain his burden of proving that he had a legitimate expectation of privacy in Cox's purse so as to allow him to challenge the validity of the search of the purse is supported by the record, which includes petitioner's admission at the suppression hearing that he did not believe that the purse would be free from governmental intrusion. Nor was petitioner entitled to challenge

the search, regardless of his expectation of privacy, merely because he claimed ownership of the drugs in the purse. While petitioner's ownership of the drugs is one fact to be considered, "arcane" concepts of property law do not control the ability to claim the protections of the Fourth Amendment. Cf. *Rakas* v. *Illinois*, 439 U. S. 128. Pp. 104–106.

2. Under the totality of circumstances present (the giving of *Miranda* warnings, the short lapse of time between petitioner's detention and his admissions being outweighed by the "congenial atmosphere" in the house during this interval, his admissions being apparently spontaneous reactions to the discovery of the drugs in Cox's purse, the police conduct not appearing to rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's admissions, and petitioner not having argued that his admissions were anything other than voluntary), Kentucky carried its burden of showing that petitioner's statements to the police admitting his ownership of the drugs were acts of free will unaffected by any illegality in his detention, assuming, *arguendo*, that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions in the house while they obtained a search warrant. Cf. *Brown* v. *Illinois*, 422 U. S. 590. Pp. 106–110.

3. The search of petitioner's person that uncovered the money and the knife was valid as incident to his formal arrest. Once he admitted ownership of the drugs found in Cox's purse, the police had probable cause to arrest him, and where the arrest followed quickly after the search of petitioner's person it is not important that the search preceded the arrest rather than vice versa. Pp. 110–111.

581 S. W. 2d 348, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and II–A of which STEWART and WHITE, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 111. WHITE, J., filed an opinion concurring in part, in which STEWART, J., joined, *post*, p. 113. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 114.

J. Vincent Aprile II argued the cause and filed briefs for petitioner.

Victor Fox, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *Steven L. Beshear*, Attorney General, and *Gerald Henry* and *Patrick B. Kimberlin III*, Assistant Attorneys General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner David Rawlings was convicted by the Commonwealth of Kentucky on charges of trafficking in, and possession of, various controlled substances. Throughout the proceedings below, Rawlings challenged the admissibility of certain evidence and statements on the ground that they were the fruits of an illegal detention and illegal searches. The trial court, the Kentucky Court of Appeals, and the Supreme Court of Kentucky all rejected Rawlings' challenges. We granted certiorari, 444 U. S. 989, and now affirm.

I

In the middle of the afternoon on October 18, 1976, six police officers armed with a warrant for the arrest of one Lawrence Marquess on charges of drug distribution arrived at Marquess' house in Bowling Green, Ky. In the house at the time the police arrived were one of Marquess' housemates, Dennis Saddler, and four visitors, Keith Northern, Linda Braden, Vanessa Cox, and petitioner David Rawlings. While searching unsuccessfully in the house for Marquess, several police officers smelled marihuana smoke and saw marihuana seeds on the mantel in one of the bedrooms. After conferring briefly, Officers Eddie Railey and John Bruce left to obtain a search warrant. While Railey and Bruce were gone, the other four officers detained the occupants of the house in the living room, allowing them to leave only if they consented to a body search. Northern and Braden did consent to such a search and were permitted to depart. Saddler, Cox, and petitioner remained seated in the living room.

Approximately 45 minutes later, Railey and Bruce returned with a warrant authorizing them to search the house. Railey read the warrant to Saddler, Cox, and petitioner, and also read *"Miranda"* warnings from a card he carried in his pocket. At that time, Cox was seated on a couch with petitioner seated to her left. In the space between them was Cox's handbag.

After Railey finished his recitation, he approached petitioner

and told him to stand. Officer Don Bivens simultaneously approached Cox and ordered her to empty the contents of her purse onto a coffee table in front of the couch. Among those contents were a jar containing 1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methyprylan, and pentobarbital, all of which are controlled substances under Kentucky law.

Upon pouring these objects out onto the coffee table, Cox turned to petitioner and told him "to take what was his." App. 62. Petitioner, who was standing in response to Officer Railey's command, immediately claimed ownership of the controlled substances. At that time, Railey searched petitioner's person and found $4,500 in cash in petitioner's shirt pocket and a knife in a sheath at petitioner's side. Railey then placed petitioner under formal arrest.

Petitioner was indicted for possession with intent to sell the various controlled substances recovered from Cox's purse. At the suppression hearing, he testified that he had flown into Bowling Green about a week before his arrest to look for a job and perhaps to attend the local university. He brought with him at that time the drugs later found in Cox's purse. Initially, petitioner stayed in the house where the arrest took place as the guest of Michael Swank, who shared the house with Marquess and Saddler. While at a party at that house, he met Cox and spent at least two nights of the next week on a couch at Cox's house.

On the morning of petitioner's arrest, Cox had dropped him off at Swank's house where he waited for her to return from class. At that time, he was carrying the drugs in a green bank bag. When Cox returned to the house to meet him, petitioner dumped the contents of the bank bag into Cox's purse. Although there is dispute over the discussion that took place, petitioner testified that he "asked her if she would carry this for me, and she said, 'yes'. . . ." App. 42.[1] Petitioner

[1] At petitioner's trial, Vanessa Cox described the transfer of possession quite differently. She testified that, as she and petitioner were getting

then left the room to use the bathroom and, by the time he returned, discovered that the police had arrived to arrest Marquess.

The trial court denied petitioner's motion to suppress the drugs and the money and to exclude the statements made by petitioner when the police discovered the drugs. According to the trial court, the warrant obtained by the police authorized them to search Cox's purse. Moreover, even if the search of the purse was illegal, the trial court believed that petitioner lacked "standing" to contest that search. Finally, the trial court believed that the search that revealed the money and the knife was permissible "under the exigencies of the situation." *Id.*, at 21. After a bench trial, petitioner was found guilty of possession with intent to sell LSD and of possession of benzphetamine, methamphetamine, methyprylan, and pentobarbital.

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ready to leave the house, petitioner asked "would you please carry this for me" and simultaneously dumped the drugs into her purse. According to Cox, she looked into her purse, saw the drugs, and said "would you please take this, I do not want this in my purse." Petitioner allegedly replied "okay, just a minute, I will," and then went out of the room. At that point the police entered the house. Tr. 12–14. David Saddler, who was in the next room at the time of the transfer, corroborated Cox's version of the events, testifying that he heard Cox say "I do not want this in my purse" and that he heard petitioner reply "don't worry" or something to that effect. *Id.*, at 100.

Although none of the lower courts specifically found that Cox did not consent to the bailment, the trial court clearly was skeptical about petitioner's version of events:

"The Court finds it unbelievable that just of his own volition, David Rawlings put the contraband in the purse of Mrs. Cox just a minute before the officers knocked on the door. He had been carrying these things around Bowling Green in a bank deposit sack for days, either on his person or in his pocket, and it is unworthy of belief that just immediately before the officers knocked on the door that he put them in the purse of Vanessa Cox. It is far more plausible to believe that he saw the officers pull up out front and then elected to 'push them off' on Vanessa Cox, believing that search was probable, possible, and emminent [*sic*]." App. 21.

The Kentucky Court of Appeals affirmed. Disagreeing with the trial court, the appellate court held that petitioner did have "standing" to dispute the legality of the search of Cox's purse but that the detention of the five persons present in the house and the subsequent searches were legitimate because the police had probable cause to arrest all five people in the house when they smelled the marihuana smoke and saw the marihuana seeds.

The Supreme Court of Kentucky in turn affirmed, but again on a somewhat different rationale. See 581 S. W. 2d 348 (1979). According to the Supreme Court, petitioner had no "standing" because he had no "legitimate or reasonable expectation of freedom from governmental intrusion" into Cox's purse. *Id.*, at 350, citing *Rakas* v. *Illinois*, 439 U. S. 128 (1978). Moreover, according to the Supreme Court, the search uncovering the money in petitioner's pocket, which search followed petitioner's admission that he owned the drugs in Cox's purse, was justifiable as incident to a lawful arrest based on probable cause.

II

In this Court, petitioner challenges three aspects of the judgment below. First, he claims that he did have a reasonable expectation of privacy in Cox's purse so as to allow him to challenge the legality of the search of that purse.[2] Second, petitioner argues that his admission of ownership was the fruit of an illegal detention that began when the police refused to let the occupants of the house leave unless they consented to a search. Third, petitioner contends that the search uncovering the money and the knife was itself illegal.

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[2] Petitioner also claims that he is entitled to "automatic standing" to contest the legality of the search that uncovered the drugs. See *Jones* v. *United States*, 362 U. S. 257 (1960). Our decision today in *United States* v. *Salvucci*, *ante*, p. 83, disposes of this contention adversely to him.

A

In holding that petitioner could not challenge the legality of the search of Cox's purse, the Supreme Court of Kentucky looked primarily to our then recent decision in *Rakas* v. *Illinois, supra,* where we abandoned a separate inquiry into a defendant's "standing" to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a "legitimate expectation of privacy" in the area searched. See *Katz* v. *United States,* 389 U. S. 347 (1967). In the present case, the Supreme Court of Kentucky looked to the "totality of the circumstances," including petitioner's own admission at the suppression hearing that he did not believe that Cox's purse would be free from governmental intrusion,[3] and held that petitioner "[had] not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated" by the search of the purse. 581 S. W. 2d, at 350.

We believe that the record in this case supports that conclusion. Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse. See

[3] Under questioning by his own counsel, petitioner testified as follows:

"Q72 Did you feel that Vannessa [*sic*] Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?

"A No sir." App. 48.

The trial court also credited this statement, noting immediately:

"You know what, I believe this boy tells the truth. You all wanted to bring him in here before the Court, and he said, 'no, I want a jury.' He said 'no, I don't understand that.' And I don't blame him for not understanding that. That's the first time I've ever seen such a thing brought on before this Court, and I've been here for quite a few years as an attorney, of course.

"Now, no question but what the boy fully understood what was meant by that. None at all in the Court's mind. If you want to go ahead, you can do so." *Ibid.*

Rakas v. *Illinois*, *supra*, at 131, n. 1; *Simmons* v. *United States*, 390 U. S. 377, 389–390 (1968). At the time petitioner dumped thousands of dollars worth of illegal drugs into Cox's purse, he had known her for only a few days. According to Cox's uncontested testimony, petitioner had never sought or received access to her purse prior to that sudden bailment. Contrast *Jones* v. *United States*, 362 U. S. 257, 259 (1960). Nor did petitioner have any right to exclude other persons from access to Cox's purse. See *Rakas* v. *Illinois*, *supra*, at 149. In fact, Cox testified that Bob Stallons, a longtime acquaintance and frequent companion of Cox's, had free access to her purse and on the very morning of the arrest had rummaged through its contents in search of a hairbrush. Moreover, even assuming that petitioner's version of the bailment is correct and that Cox did consent to the transfer of possession,[4] the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy. Contrast *United States* v. *Chadwick*, 433 U. S. 1, 11 (1977); *Katz* v. *United States*, *supra*, at 352. In addition to all the foregoing facts, the record also contains a frank admission by petitioner that he had no subjective expectation that Cox's purse would remain free from governmental intrusion, an admission credited by both the trial court and the Supreme Court of Kentucky. See n. 3, *supra*, and accompanying text.

Petitioner contends nevertheless that, because he claimed ownership of the drugs in Cox's purse, he should be entitled to challenge the search regardless of his expectation of privacy. We disagree. While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. See 439 U. S., at 149–150, n. 17. See also *United States* v. *Salvucci*, *ante*, at 91–92.

[4] But see n. 1, *supra*.

Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas*, petitioner might have been given "standing" in such a case to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.

In sum, we find no reason to overturn the lower court's conclusion that petitioner had no legitimate expectation of privacy in Cox's purse at the time of the search.

B

We turn, then, to petitioner's contention that the occupants of the house were illegally detained by the police and that his admission to ownership of the drugs was a fruit of that illegal detention. Somewhat surprisingly, none of the courts below confronted this issue squarely, even though it would seem to be presented under any analysis of this case except that adopted by the Kentucky Court of Appeals, which concluded that the police officers were entitled to arrest the five occupants of the house as soon as they smelled marihuana smoke and saw the marihuana seeds.

We can assume both that this issue was properly presented in the Kentucky courts and that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions in the house while they obtained a search warrant for the premises. Even given such a constitutional violation, however, exclusion of petitioner's admissions would not be necessary unless his statements were the result of his illegal detention. As we noted in *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975), where we rejected a "but for" approach to the admissibility of such statements, "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." In *Brown* we also set forth

the standard for determining whether such statements were tainted by antecedent illegality:

> "The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive. . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution." *Id.*, at 603–604 (footnotes and citations omitted).

See also *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979). As already noted, the lower courts did not undertake the inquiry suggested by *Brown*. Nevertheless, as in *Brown* itself, we believe that "the trial resulted in a record of amply sufficient detail and depth from which the determination may be made." 422 U. S., at 604.

First, we observe that petitioner received *Miranda* warnings only moments before he made his incriminating statements, a consideration *Brown* treated as important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of an illegal detention.

Second, *Brown* calls our attention to the "temporal proximity of the arrest and the confession. . . ." *Id.*, at 603. In this case, petitioner and his companions were detained for a period of approximately 45 minutes. Although under the strictest of custodial conditions such a short lapse of time might not suffice to purge the initial taint, we believe it necessary to examine the precise conditions under which the occupants of this house were detained. By all accounts, the three people who chose not to consent to a body search in order to leave sat

quietly in the living room or, at least initially, moved freely about the first floor of the house. Upon being informed that he would be detained until Officers Railey and Bruce returned with a search warrant, Dennis Saddler "just went on in and got a cup of coffee and sat down and started waiting" for the officers to return. Tr. 109. When asked by petitioner's counsel whether there was "any show of force or violence by you or Dave or anybody else," Saddler explained:

> "A Oh, no. One person tried to sick my four and a half month old dog on one of the officers. (laughing)
>
> "Q48 You're saying that in a joking manner?
>
> "A Yeah. He just wagged his tail.
>
> "Q49 And other than that, that's the most violent thing you proposed toward these police officers; is that correct?
>
> "A Yes sir. I would—they were more or less courteous to us and were trying to be—we offered them coffee or a drink of water or whatever they wanted." *Id.*, at 113.

According to Saddler, petitioner's first reaction when the officers told him that he would be detained pending issuance of a search warrant was to "[get] up and put an album on. . . ." *Id.*, at 110. As even the dissenting judge in the Court of Appeals noted: "[A]ll witnesses for both sides of this litigation agreed to the congenial atmosphere existing during the forty-five minute interval. . . ." App. 73 (Lester, J., dissenting). We think that these circumstances outweigh the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions.

Third, *Brown* suggests that we inquire whether any circumstances intervened between the initial detention and the challenged statements. Here, where petitioner's admissions were apparently spontaneous reactions to the discovery of his drugs in Cox's purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted "of free will unaffected by the initial illegality." 422 U. S., at

603. Nor need we speculate as to petitioner's motivations in admitting ownership of the drugs, since he explained them later to Lawrence Marquess and Dennis Saddler. Under examination by petitioner's counsel, Marquess testified as follows:

> "Q1 Mr. Marquess, when you were talking to David Rawlings in the jail, and he told you that the things were dumped out on the table and that he admitted they were his, did he tell you why he did that?
>
> "A Well, he said Vanessa [Cox] was freaking out, you know, or something.
>
> "Q2 Did he tell you that he did that to protect her or words to that effect?
>
> "A Well, now, I mean he said he was going to take what was his, I mean, he wasn't going to try to pin that on her." Tr. 130.

Saddler offered additional insight into petitioner's motivations:

> "Q114 Did Dave Rawlings make any statements to you in jail about any of these substances?
>
> "A Yes sir.
>
> "Q115 And would you tell the Court what statements he made?
>
> "A Well, his main concern was whether or not Vanessa Cox was going to say anything, and he just kept talking and harping on that, and I don't know how many times he mentioned it, you know, 'I hope she doesn't break,' or hope she doesn't talk. And I saw her walking on the sidewalk through the windows and got a little upset about that because we all thought she turned State's evidence." *Id.*, at 103.

Fourth, *Brown* mandates consideration of "the purpose and flagrancy of the official misconduct. . . ." 422 U. S., at 604. The officers who detained petitioner and his companions uniformly testified that they took those measures to avoid the

asportation or destruction of the marihuana they thought was present in the house and that they believed that a warrant authorizing them to search the house would also authorize them to search the five occupants of the house. While the legality of temporarily detaining a person at the scene of suspected drug activity to secure a search warrant may be an open question,[5] and while the officer's belief about the scope of the warrant they obtained may well have been erroneous under our recent decision in *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements. Contrast *Brown* v. *Illinois*, *supra*, at 605.

Finally, while *Brown* requires that the voluntariness of the statement be established as a threshold requirement, petitioner has not argued here or in any other court that his admission to ownership of the drugs was anything other than voluntary. Thus, examining the totality of circumstances present in this case, we believe that the Commonwealth of Kentucky has carried its burden of showing that petitioner's statements were acts of free will unaffected by any illegality in the initial detention.

C

Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the

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[5] "The reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway* v. *New York*, 442 U. S. 200, 209–210 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968), depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, [422 U. S. 873, 878 (1975)]. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U. S. 47, 50–51 (1979).

Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner's formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. See *Bailey* v. *United States*, 128 U. S. App. D. C. 354, 357, 389 F. 2d 305, 308 (1967); *United States* v. *Brown*, 150 U. S. App. D. C. 113, 114, 463 F. 2d 949, 950 (1972). See also *Cupp* v. *Murphy*, 412 U. S. 291 (1973); *United States* v. *Gorman*, 355 F. 2d 151, 160 (CA2 1965) (dictum), cert. denied, 384 U. S. 1024 (1966).[6]

III

Having found no error in the lower courts' refusal to suppress the evidence challenged by petitioner, we believe that the judgment of the Supreme Court of Kentucky should be, and the same hereby is,

Affirmed.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but I write separately to explain my somewhat different approach to the issues addressed in Part II–A thereof.

In my view, *Rakas* v. *Illinois*, 439 U. S. 128 (1978), recognized two analytically distinct but "invariably intertwined" issues of substantive Fourth Amendment jurisprudence. *Id.*, at 139. The first is "whether [a] disputed search or seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," *id.*, at 140; the second

[6] The fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner.

is whether "the challenged search or seizure violated [that] Fourth Amendment righ[t]," *ibid.* The first of these questions is answered by determining whether the defendant has a "legitimate expectation of privacy" that has been invaded by a governmental search or seizure. The second is answered by determining whether applicable cause and warrant requirements have been properly observed.

I agree with the Court that these two inquiries "merge into one," *ante*, at 106, in the sense that both are to be addressed under the principles of Fourth Amendment analysis developed in *Katz* v. *United States*, 389 U. S. 347 (1967), and its progeny. But I do not read today's decision, or *Rakas*, as holding that it is improper for lower courts to treat these inquiries as distinct components of a Fourth Amendment claim. Indeed, I am convinced that it would invite confusion to hold otherwise. It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.

Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is "arcane." Not every interest in property exists only in the desiccated atmosphere of ancient maxims and dusty books. Earlier this Term the Court recognized that "the right to exclude" is an essential element of modern property rights. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179–180 (1979). In my view, that "right to exclude" often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest. Accordingly, I would confine analysis to the facts of this case. On those facts, however, I agree that petitioner's possessory interest in the vials of controlled

substances is not sufficient to create a privacy interest in Vanessa Cox's purse, and that such an interest was not otherwise conferred by any agreement between petitioner and Cox.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring in part.

Although I join Parts I and II–A of the Court's opinion, I do not join Parts II–B, II–C, and III because I believe that the fruits inquiry undertaken in Part II–B should not be done in the first instance in this Court. As the Court recognizes, the Supreme Court of Kentucky did not address the question whether petitioner's admission to ownership of the drugs was the fruit of an illegal detention, even though the question was presented there. The state-court majority did state that in concluding that the search of petitioner's person was incident to a valid arrest it "disregard[ed] as irrelevant the detention during the period in which the officers were procuring a search warrant." The court also observed that "[t]his search was not explored in detail at the suppression hearing" and that "the sequence of the search of the purse and Rawlings' admission of ownership of the drugs is not clearly established in the record." The court then concluded that "[c]learly, after Rawlings admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest." 581 S. W. 2d 348, 350 (1979).

In proceeding in this manner, the Supreme Court of Kentucky plainly failed properly to dispose of a federal question, as the Court implicitly recognizes. Because the fruits question was never addressed below and was barely mentioned in the briefs before this Court, I would vacate the judgment below and remand to permit the state court to address the question under the correct legal standard. This Court should not attempt to decide a factual issue on a record that the

state court itself apparently thought inadequate for that purpose.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The vials of pills found in Vanessa Cox's purse and petitioner's admission that they belonged to him established his guilt conclusively. The State concedes, as it must, that the search of the purse was unreasonable and in violation of the Fourth Amendment, see *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), and the Court assumes that the detention which led to the search, the seizure, and the admissions also violated the Fourth Amendment, *ante*, at 106. Nevertheless, the Court upholds the conviction. I dissent.

I

The Court holds first that petitioner may not object to the introduction of the pills into evidence because the unconstitutional actions of the police officers did not violate his personal Fourth Amendment rights. To reach this result, the Court holds that the Constitution protects an individual against unreasonable searches and seizures only if he has "a 'legitimate expectation of privacy' in the area searched." *Ante*, at 104. This holding cavalierly rejects the fundamental principle, unquestioned until today, that an interest in either the place searched or the property seized is sufficient to invoke the Constitution's protections against unreasonable searches and seizures.

The Court's examination of previous Fourth Amendment cases begins and ends—as it must if it is to reach its desired conclusion—with *Rakas* v. *Illinois*, 439 U. S. 128 (1978). Contrary to the Court's assertion, however, *Rakas* did not establish that the Fourth Amendment protects individuals against unreasonable searches and seizures only if they have a privacy interest in the place searched. The question before the Court in *Rakas* was whether the defendants could estab-

lish their right to Fourth Amendment protection simply by showing that they were "legitimately on [the] premises" searched, see *Jones* v. *United States*, 362 U. S. 257, 267 (1960). Overruling that portion of *Jones*, the Court held that when a Fourth Amendment objection is based on an interest in the place searched, the defendant must show an actual invasion of his personal privacy interest. The petitioners in *Rakas* did not claim that they had standing either under the *Jones* automatic standing rule for persons charged with possessory offenses, which the Court overrules today, see *United States* v. *Salvucci*, *ante*, p. 83, or because their possessory interest in the items seized gave them "actual standing." No Fourth Amendment claim based on an interest in the property seized was before the Court, and, consequently, the Court did not and could not have decided whether such a claim could be maintained. In fact, the Court expressly disavowed any intention to foreclose such a claim ("This is not to say that such [casual] visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search," 439 U. S., at 142, n. 11), and suggested its continuing validity ("[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized*," *id.*, at 148 (emphasis supplied)).

The decision today, then, is not supported by the only case directly cited in its favor.* Further, the Court has ignored

*The Court invites the reader to "contrast" *Jones* v. *United States*, 362 U. S. 257 (1960), which it expressly overrules, and to "see" *Simmons* v. *United States*, 390 U. S. 377, 389–390 (1968). *Ante*, at 105, 104. The passage cited in *Simmons* contains the following language: "At one time, a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor *of the seized property* or that he had a possessory interest in the searched premises." 390 U. S., at 389–390 (emphasis supplied). The Court in *Simmons* then observed that *Jones* had "relaxed" those standing requirements by holding that in a case charging a possessory offense "the Government is precluded from denying that the defendant has the requisite possessory interest to chal-

a long tradition embodying the opposite view. *United States* v. *Jeffers*, 342 U. S. 48 (1951), for example, involved a seizure of contraband alleged to belong to the defendant from a hotel room occupied by his two aunts. The Court rejected the Government's argument that because the search of the room did not invade Jeffers' privacy he lacked standing to suppress the evidence. It held that standing to object to the seizure could not be separated from standing to object to the search, for "[t]he search and seizure are . . . incapable of being untied." *Id.*, at 52. The Court then concluded that Jeffers "unquestionably had standing . . . unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of *a property interest therein.*" *Ibid.* (emphasis supplied).

Similarly, *Jones* v. *United States*, *supra*, is quite plainly premised on the understanding that an interest in the seized property is sufficient to establish that the defendant "himself was the victim of an invasion of privacy." 362 U. S., at 261. The Court observed that the "conventional standing requirement," *id.*, at 262, required the defendant to "claim either to have *owned or possessed the seized property* or to have had a substantial possessory interest in the premises searched," *id.*, at 261 (emphasis supplied). The Court relaxed that rule for defendants charged with possessory offenses because "[t]he same element . . . which has caused a dilemma, *i. e.*, that *possession both convicts and confers standing*, eliminates any necessity for a preliminary showing of an interest in the premises searched *or the property seized*, which ordinarily is

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lenge the admission of the evidence. . . ." 390 U. S., at 390. The Court also "contrasts" two other cases in connection with its subsidiary point that a "bailment" that is "precipitous" may not be enough to show that a person "took normal precautions to maintain his privacy." *Ante*, at 105. The Court also cites *Katz* v. *United States*, 389 U. S. 347 (1967), as the source of the phrase "legitimate expectation of privacy." But *Katz* did not purport to restrict the interest protected by the Fourth Amendment, see *infra*, at 119–120.

required when standing is challenged." *Id.*, at 263 (emphasis supplied). Instead, "[t]he possession on the basis of which petitioner is to be and was convicted suffices to give him standing," *id.*, at 264.

Simmons v. *United States*, 390 U. S. 377 (1968), proceeded upon a like understanding. The Court there reiterated that prior to *Jones* "a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor *of the seized property* or that he had a possessory interest in the searched premises." 390 U. S., at 389–390 (emphasis supplied). *Jones* had changed that rule only with respect to defendants charged with possessory offenses, so the defendant Garrett, who was charged with armed robbery, had to establish standing. Because he was not "legitimately on [the] premises" at the time of the search, see *Jones*, *supra*, at 267, "[t]he only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner." 390 U. S., at 391 (footnote omitted). See also *Brown* v. *United States*, 411 U. S. 223, 228 (1973); *Mancusi* v. *DeForte*, 392 U. S. 364, 367 (1968).

The Court's decision today is not wrong, however, simply because it is contrary to our previous cases. It is wrong because it is contrary to the Fourth Amendment, which guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court's reading of the Amendment is far too narrow. The Court misreads the guarantee of security "*in* their persons, houses, papers, and effects, *against* unreasonable searches and seizures" to afford protection only against unreasonable searches and seizures *of* persons and places.

The Fourth Amendment, it seems to me, provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been

understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced. The interest in the item seized is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct.

The idea that a person cannot object to a search unless he can show an interest in the premises, even though he is the owner of the seized property, was squarely rejected almost 30 years ago in *United States* v. *Jeffers, supra.* There the Court stated:

> "The Government argues . . . that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.*, at 52.

When the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. That interference gives him the right to challenge the reasonableness of the government's conduct, including the seizure. If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable.

In holding that the Fourth Amendment protects only those with a privacy interest in the place searched, and not those with an ownership or possessory interest in the things seized, the Court has turned the development of the law of search

and seizure on its head. The history of the Fourth Amendment shows that it was designed to protect property interests as well as privacy interests; in fact, until *Jones* the question whether a person's Fourth Amendment rights had been violated turned on whether he had a property interest in the place searched or the items seized. *Jones* and *Katz* v. *United States*, 389 U. S. 347 (1967), expanded our view of the protections afforded by the Fourth Amendment by recognizing that privacy interests are protected even if they do not arise from property rights. But that recognition was never intended to exclude interests that had historically been sheltered by the Fourth Amendment from its protection. Neither *Jones* nor *Katz* purported to provide an exclusive definition of the interests protected by the Fourth Amendment. Indeed, as *Katz* recognized: "That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U. S., at 350. Those decisions freed Fourth Amendment jurisprudence from the constraints of "subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones*, 362 U. S., at 266. Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment did not render property rights wholly outside its protection, however. Not every concept involving property rights, we should remember, is "arcane." Cf. *ante*, at 105.

In fact, the Court rather inconsistently denies that property rights may, by themselves, entitle one to the protection of the Fourth Amendment, but simultaneously suggests that a person may claim such protection only if his expectation of privacy in the premises searched is so strong that he may exclude all others from that place. See *ante*, at 105–106; *Rakas* v. *Illinois*, 439 U. S., at 149. Such a harsh threshold require-

ment was not imposed even in the heyday of a property rights oriented Fourth Amendment.

II

Petitioner also contends that his admission of ownership of the drugs should have been suppressed as the fruit of an unlawful detention. The state courts did not pass on that claim, and no factual record was developed which would shed light on the proper disposition of the claim. In such circumstances, it would be appropriate for us to defer to the state court and permit it to make the initial determination. Nevertheless, the majority proceeds to dispose of petitioner's claim by concluding that, even if the detention was illegal, "petitioner's statements were acts of free will unaffected by any illegality in the initial detention." *Ante,* at 110. I disagree.

Petitioner's admissions, far from being "spontaneous," *ante,* at 108, were made in response to Vanessa Cox's demand that petitioner "take what was his." In turn, it is plain that her statement was the direct product of the illegal search of her purse. And that search was made possible only because the police refused to let anyone in the house depart unless they "consented" to a body search; that detention the Court has assumed was illegal. Under these circumstances petitioner's admissions were obviously the fruit of the illegal detention and should have been suppressed.

III

In the words of Mr. Justice Frankfurter: "A decision [of a Fourth Amendment claim] may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime." *Harris* v. *United States,* 331 U. S. 145, 157 (1947) (dissenting opinion). Today a majority of the Court has substantially cut back the protection afforded by the Fourth Amendment and the ability of the

people to claim that protection, apparently out of concern lest the government's ability to obtain criminal convictions be impeded. A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation. Because we are called on to decide whether evidence should be excluded only when a search has been "successful," it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society. Accordingly, I dissent.

MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT *v.* GAGNE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78–1888. Argued January 9, 1980—Decided June 25, 1980

Respondent is a recipient of benefits under Connecticut's federally funded Aid to Families with Dependent Children (AFDC) program. She brought this action in Federal District Court under 42 U. S. C. § 1983, alleging that Connecticut's AFDC regulations denied her credit for substantial portions of her actual work-related expenses, thus reducing the level of her benefits, and that such regulations violated the Social Security Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Ultimately, the case was settled and the District Court entered a consent decree that provided for a substantial increase in the standard allowances for work-related expenses and gave AFDC recipients the right to prove that their actual work-related expenses were in excess of the standard. The District Court then awarded respondent's counsel a fee pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The court held that respondent was entitled to fees under the Act because, in addition to her statutory claim, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction. The Court of Appeals affirmed.

Held:

1. Under § 1988 the district courts' authority to award attorney's fees is not limited to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil or equal rights. As the Court holds in *Maine* v. *Thiboutot*, *ante*, p. 1, § 1988 applies to all types of § 1983 actions, including actions based solely on Social Security Act violations. Thus, even if respondent's claim could be characterized as arising solely out of a Social Security Act violation, this would not preclude the award of attorney's fees under § 1988. Pp. 128–129.

2. The fact that respondent prevailed through a settlement rather than through litigation does not preclude her from claiming attorney's fees

as the "prevailing party" within the meaning of § 1988. And petitioner's contention that respondent did not gain sufficient relief through the consent decree to be considered the prevailing party is without merit in view of the District Court's contrary finding, which was upheld by the Court of Appeals. Pp. 129–130.

3. The District Court was not barred by the Eleventh Amendment from awarding attorney's fees against the State. Respondent alleged constitutional violations which both courts below held to be sufficiently substantial to support federal jurisdiction, and the constitutional issues remained in the case until the consent decree was entered. Under these circumstances, petitioner's Eleventh Amendment claim is foreclosed by *Hutto* v. *Finney*, 437 U. S. 678. In *Hutto*, the Court rejected the argument that the general language of the Act was insufficient to remove an Eleventh Amendment barrier, noting that "this Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.*, at 695. Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of attorney's fees against a State, Congress clearly acted within its power under § 5 of the Fourteenth Amendment in removing that barrier. Under § 5, Congress may pass any legislation that is appropriate to enforce the Fourteenth Amendment's guarantees, and a statute awarding attorney's fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication falls within the category of "appropriate" legislation. Pp. 130–133.

594 F. 2d 336, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined, and in Part II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 133.

Edmund C. Walsh, Assistant Attorney General of Connecticut, argued the cause for petitioner. With him on the brief was *Carl R. Ajello*, Attorney General.

Joan Eisenman Pilver argued the cause for respondent. With her on the brief were *Michael B. Trister* and *David C. Shaw*.

MR. JUSTICE STEVENS delivered the opinion of the Court.

In an action brought under 42 U. S. C. § 1983, the court, in its discretion, may allow the prevailing party to recover a reasonable attorney's fee as part of the award of costs.[1] The question presented by this petition is whether fees may be assessed against state officials after a case has been settled by the entry of a consent decree, without any determination that the plaintiff's constitutional rights have been violated.

Petitioner is responsible for the administration of Connecticut's Aid to Families with Dependent Children (AFDC), a federally funded public assistance program.[2] Respondent is a working recipient of AFDC benefits. Under state and federal regulations, the amount of her benefits depends, in part, on her net earnings, which are defined as her wages minus certain work-related expenses. In 1975 respondent filed a complaint in the United States District Court for the District of Connecticut alleging that Connecticut's AFDC regulations denied her credit for substantial portions of her actual work-related expenses,[3] thus reducing the level of her benefits. Her

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[1] The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides:

"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This statute is codified in 42 U. S. C. § 1988; in the codification § 1979 of the Revised Statutes has been renumbered to refer to § 1983 of Title 42 of the United States Code.

[2] The action was filed against petitioner's predecessor in office, Nicholas Norton, Commissioner of Welfare of the State of Connecticut. The title of the position has since been changed to "Commissioner of Income Maintenance." We shall simply refer to the Commissioner as "petitioner."

[3] Connecticut's Department of Social Services Manual provided that only certain enumerated expenses could be deducted; the amounts allowed

complaint alleged that these regulations violated § 402 (a)(7) of the Social Security Act, 42 U. S. C. § 602 (a)(7),[4] and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.[5] The complaint further alleged that relief was authorized by 42 U. S. C. § 1983[6] and invoked federal jurisdiction under 28 U. S. C. § 1343.[7]

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for lunches and automobile transportation were limited to 50 cents per working day and 6 cents per mile respectively. App. 66. The complaint alleged that respondent's actual transportation expenses were 13.9 cents per mile and that her meal expenses amounted to $1.65 per day. *Id.*, at 8.

[4] The statute requires States to take into consideration "any expenses reasonably attributable to the earning of . . . income." In *Shea* v. *Vialpando*, 416 U. S. 251, this Court held that participating States could not place arbitrary limits on the amount of work-related expenses that could be claimed by recipients. Although States may use standardized allowances for the sake of administrative convenience, they must give recipients the opportunity to demonstrate that their actual expenses exceed the standard.

[5] In her complaint respondent alleged:

"28. Defendants' practice and policy constitute an invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by forbidding plaintiff and the class she represents ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances of Index 332.31 are reasonable.

. . . . . .

"32. Defendants' practice and policy violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that:

"a) Defendants' practice and policy establish an irrebutable [*sic*] presumption that the plaintiff's work-related transportation and lunch allowances are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it.

"b) The standard lunch and transportation allowances contained in Index 332.31 are arbitrary in that they were not developed by a statistically fair averaging, nor do they reflect current prices." App. 9–10.

[6] "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be sub-

[*Footnote 7 is on p. 126*]

A few months after the action was commenced, while discovery was underway, petitioner amended the AFDC regulations to authorize a deduction for all reasonable work-related expenses. After an interval of almost a year and a half, respondent filed an amended complaint alleging that actual expenses in excess of certain standard allowances were still being routinely disallowed. Thereafter, a settlement was negotiated and the District Court entered a consent decree that, among other things, provided for a substantial increase in the standard allowances and gave AFDC recipients the right to prove that their actual work-related expenses were in excess of the standard.[8] The parties informally agreed that the question whether respondent was entitled to recover attorney's fees would be submitted to the District Court after the entry of the consent decree.

Following an adversary hearing, the District Court awarded respondent's counsel a fee of $3,012.19. 455 F. Supp. 1344

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Title 28 U. S. C. §§ 1343 (3) and (4) provide as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[8] As is customary, the consent decree did not purport to adjudicate respondent's statutory or constitutional claims. Rather, it explicitly stated that "[n]othing in this Consent Decree is intended to constitute an admission of fault by either party to this action." App. 76.

(1978). The court held that respondent was the "prevailing party" within the meaning of § 1988 because, while not prevailing "in every particular," she had won "substantially all of the relief originally sought in her complaint" in the consent decree. *Id.*, at 1347. The court also rejected petitioner's argument that an award of fees against him was barred by the Eleventh Amendment in the absence of a judicial determination that respondent's constitutional rights had been violated. Relying on the basic policy against deciding constitutional claims unnecessarily, the court held that respondent was entitled to fees under the Act because, in addition to her statutory claim, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction under the reasoning of *Hagans* v. *Lavine*, 415 U. S. 528.

The Court of Appeals affirmed, 594 F. 2d 336 (CA2 1979), holding that Congress intended to authorize an award of fees in this kind of situation and that it had the constitutional power to do so.[9] We granted certiorari to consider both the statutory and constitutional questions. 444 U. S. 824.

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[9] The court rejected petitioner's constitutional claim on two grounds. First, it held that the Eleventh Amendment does not apply to an award of attorney's fees because such fees are ancillary to the imposition of prospective relief within the reasoning of *Edelman* v. *Jordan*, 415 U. S. 651. Second, the court held that, even if the Eleventh Amendment did apply, Congress had the power to authorize the assessment of fees in a case such as this under the Fourteenth Amendment:

"The State contends, however, that Congress' power under the Fourteenth Amendment to override state sovereign immunity extends only to suits in which a party prevails on a *constitutional* claim. On this view, Congress cannot validly authorize a fee award against a state in the absence of a judicial determination that plaintiff had a meritorious constitutional claim. We disagree. We think it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails on a statutory claim as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts. Such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues. As we understand the

I

Petitioner's first argument is that Congress did not intend to authorize the award of attorney's fees in every type of § 1983 action, but rather limited the courts' authority to award fees to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights. In support of this contention, petitioner relies on our holding in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, that there is no federal jurisdiction under § 1343 over § 1983 claims outside these categories and that there is therefore no jurisdiction under § 1343 over a § 1983 claim based solely on a violation of the Social Security Act. Characterizing respondent's claim in this case as arising solely out of a Social Security Act violation, petitioner argues that the District Court had no authority under § 1988 to award her attorney's fees.

Even if petitioner's characterization of respondent's claim were correct,[10] his argument would have to be rejected. In *Maine* v. *Thiboutot*, *ante*, p. 1, decided this day, we hold that § 1988 applies to all types of § 1983 actions, including actions based solely on Social Security Act violations. As MR. JUSTICE BRENNAN's opinion for the Court in *Thiboutot*

Supreme Court decisions, any appropriate means of implementing the Fourteenth Amendment overrides the State's Eleventh Amendment rights, see, *e. g.*, *Fitzpatrick* v. *Bitzer*, *supra*, 427 U. S., at 453, 456; *Katzenbach* v. *Morgan*, 384 U. S. 641, 648–650 (1966). We hold that the authorization of attorneys' fees to be awarded under the standards set forth above is an appropriate way to achieve the competing goals described above." (Emphasis in original.) 594 F. 2d, at 342–343.

[10] Petitioner ignores the fact that respondent did allege constitutional claims which the District Court and the Court of Appeals both found to be sufficiently substantial to support federal jurisdiction under *Hagans* v. *Lavine*, 415 U. S. 528. Under these circumstances petitioner could not have prevailed on his statutory argument even if the Court had reached the opposite result in *Thiboutot*. See n. 15, *infra*.

demonstrates, neither the language of § 1988 nor its legislative history provides any basis for importing the distinctions *Chapman* made among § 1983 actions for purposes of federal jurisdiction into the award of attorney's fees by a court that possesses jurisdiction over the claim.[11]

We also find no merit in petitioner's suggestion that respondent was not the "prevailing party" within the meaning of § 1988. The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94–1011, p. 5 (1976).

Nor can we accept petitioner's contention that respondent

[11] The jurisdictional statute at issue in *Chapman*, 28 U. S. C. § 1343, specifically limits district court jurisdiction to cases in which the plaintiff alleges a violation of a right secured by the Constitution or by a federal statute "providing for equal rights" or "civil rights." Inasmuch as it does not create substantive rights at all, but merely provides a remedy for the violation of rights conferred by the Constitution or other statutes, § 1983 does not fall within the category of statutes providing for equal rights or civil rights. Therefore, there is not automatically federal jurisdiction under § 1343 whenever a plaintiff files a § 1983 claim; rather, the court must look to the underlying substantive right that was allegedly violated to determine whether that right was conferred by the Constitution or by a civil rights statute.

Section 1988 does not contain language like that in § 1343. Rather, § 1988 provides that attorney's fees may be awarded to the prevailing party "[i]n any action or proceeding to enforce [§ 1983]." Although the reference to actions "to enforce" § 1983 is somewhat imprecise in light of the fact that § 1983 does not itself create substantive rights, the legislative history makes it perfectly clear that the Act was intended to apply in any action for which § 1983 provides a remedy. See *Maine* v. *Thiboutot*, *ante*, at 9–10.

did not gain sufficient relief through the consent decree to be considered the prevailing party. The District Court's contrary finding was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages. That finding was upheld by the Court of Appeals, and we see no reason to question its validity. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275.

II

Petitioner's second argument is that, regardless of Congress' intent, a federal court is barred by the Eleventh Amendment from awarding fees against a State in a case involving a purely statutory, non-civil-rights claim.[12] Petitioner argues that Congress may empower federal courts to award fees against the States only insofar as it is exercising its power under § 5 of the Fourteenth Amendment to enforce substantive rights conferred by that Amendment. Thus, petitioner contends that fees can only be assessed in § 1983 actions brought to vindicate Fourteenth Amendment rights or to enforce civil rights statutes that were themselves enacted pursuant to § 5 of the Fourteenth Amendment.[13]

In this case, there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim. For, contrary to petitioner's characterization, respondent did allege violations of her Fourteenth Amendment due process and equal protec-

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[12] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment issue was not before the Court in *Thiboutot* because that case involved an award of fees by a state court pursuant to § 1988. *Ante*, at 9, n. 7.

[13] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

tion rights, which the District Court and the Court of Appeals both held to be sufficiently substantial to support federal jurisdiction under *Hagans* v. *Lavine*, 415 U. S. 528. Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree. Under these circumstances, petitioner's Eleventh Amendment claim is foreclosed by our decision in *Hutto* v. *Finney*, 437 U. S. 678.

In *Hutto*, we rejected the argument of the Attorney General of Arkansas that the general language of § 1988 was insufficient to overcome a State's claim of immunity under the Eleventh Amendment, noting that "[t]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." [14] *Id.*, at

[14] Referring to the argument of the Attorney General, we said:

"[H]e argues that these plain indications of legislative intent are not enough. In his view, Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity. The Attorney General points out that this Court has sometimes refused to impose retroactive liability on the States in the absence of an extraordinarily explicit statutory mandate. See *Employees* v. *Missouri Public Health & Welfare Dept.*, 411 U. S. 279; see also *Edelman* v. *Jordan*, 415 U. S. 651. But these cases concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief.

"The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. See *Missouri* v. *Iowa*, 7 How. 660, 681; *North Dakota* v. *Minnesota*, 263 U. S. 583 (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.

"In *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability. The power to make the award was supported by 'the inherent authority of the Court in the orderly administra-

695. Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a State, Congress was clearly acting within its power under § 5 of the Fourteenth Amendment in removing that barrier. Under § 5 Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claim falls within the category of "appropriate" legislation. And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.[15] As

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tion of justice as between all parties litigant.' *Id.*, at 74. A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant and in imposing costs upon it' when an award is called for. *Id.*, at 77.

"Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fees, is added to the category of taxable costs." 437 U. S., at 695–697 (footnotes omitted).

[15] The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H. R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:

"To the extent a plaintiff joins a claim under one of the statutes enumerated in H. R. 15460 with a claim that does not allow attorney fees, that

the Court of Appeals pointed out, such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." 594 F. 2d, at 342. It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment.[16]

The judgment is affirmed.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment, and in Part II of the Court's opinion.

Respondent's complaint presented claims under both the Social Security Act and the Fourteenth Amendment. Follow-

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plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales* v. *Haines*, 486 F. 2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans* v. *Lavine*, 415 U. S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans* v. *Lavine, supra; United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers* v. *Gibbs, supra*, at 725." H. R. Rep. No. 94–1558, p. 4, n. 7 (1976).

[16] Petitioner seeks to distinguish this case from *Hutto* v. *Finney* on the ground that *Hutto* involved an adjudication of a constitutional violation, rather than a statutory violation. However, as MR. JUSTICE REHNQUIST noted in his dissent, 437 U. S., at 717–718, the underlying claim in *Hutto* was predicated on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment rather than on any substantive provision of the Fourteenth Amendment itself. The prisoners' claim in *Hutto* was therefore arguably more analogous to the statutory claim involved in this case than to the constitutional claims asserted here or to the equal protection claim asserted in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445.

ing a settlement between the parties, the District Court ruled that respondent is a "prevailing party" under 42 U. S. C. § 1988, and that she alleged "substantial" constitutional claims as defined in *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

In this situation, the District Court and the Court of Appeals for the Second Circuit both found, the award of attorney's fees under § 1988 does not require an adjudication on the merits of the constitutional claims. I agree with this conclusion. Consequently, I see no reason to reach out, as the Court does in Part I of its opinion, to apply today's ruling in *Maine* v. *Thiboutot*, *ante*, p. 1. See *ante*, at 128–129. That decision holds that plaintiffs may win attorney's fees under § 1988 when they bring an action under 42 U. S. C. § 1983 without any constitutional claim whatever. For the reasons given in my dissenting opinion in *Thiboutot*, I believe that decision seriously misconceives the congressional purpose behind § 1983. In this case, however, the complaint included a substantial constitutional claim which "remained in the case until the entire dispute was settled by the entry of a consent decree." *Ante*, at 131. Since Congress has made plain its intent that fees be awarded to "prevailing" parties in these circumstances, see *ante*, at 132–133, n. 15, we have no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action.

In contrast, Part II of the Court's opinion resolves the Eleventh Amendment question on the narrow ground that respondent alleged "substantial" Fourteenth Amendment claims. *Ante*, at 131. *Hutto* v. *Finney*, 437 U. S. 678 (1978), held that since Congress may qualify the States' Eleventh Amendment immunity under the Enforcement Clause of the Fourteenth Amendment, § 1988 authorizes fee awards against States in these circumstances. I believe that Congress should not be deemed to have qualified the Eleventh Amendment in the absence of explicit evidence of that intent. See *Hutto*, *supra*, at 704 (POWELL, J., concurring in part and dissent-

ing in part). Nevertheless, I accept *Hutto* as binding precedent for this case and note only that the Court has reserved the question "whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim." *Ante*, at 130.

WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* BRACKER ET AL.

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 78-1177. Argued January 14, 1980—Decided June 27, 1980

Pursuant to a contract with an organization of petitioner White Mountain Apache Tribe, petitioner Pinetop Logging Co. (Pinetop), a non-Indian enterprise authorized to do business in Arizona, felled tribal timber on the Fort Apache Reservation and transported it to the tribal organization's sawmill. Pinetop's activities were performed solely on the reservation. Respondents, state agencies and members thereof, sought to impose on Pinetop Arizona's motor carrier license tax, which is assessed on the basis of the carrier's gross receipts, and its use fuel tax, which is assessed on the basis of diesel fuel used to propel a motor vehicle on any highway within the State. Pinetop paid the taxes under protest and then brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs (BIA) and tribal roads. The trial court awarded summary judgment to respondents, and the Arizona Court of Appeals affirmed in pertinent part, rejecting petitioners' pre-emption claim.

Held: The Arizona taxes are pre-empted by federal law. Cf. *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685. Pp. 141–153.

(a) The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. Where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation, a particularized inquiry must be made into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Pp. 141–145.

(b) The Federal Government's regulation of the harvesting, sale, and management of tribal timber, and of the BIA and tribal roads, is so pervasive as to preclude the additional burdens sought to be imposed here by assessing the taxes in question against Pinetop for operations that are conducted solely on BIA and tribal roads within the reservation. Pp. 145–149.

(c) Imposition of the taxes in question would undermine the federal policy of assuring that the profits from timber sales would inure to the

Tribe's benefit; would also undermine the Secretary of the Interior's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber; and would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law. Pp. 149–150.

(d) Respondents' generalized interest in raising revenue is insufficient, in the context of this case, to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber. P. 150.

120 Ariz. 282, 585 P. 2d 891, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 170. STEVENS, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 153.

Neil Vincent Wake argued the cause for petitioner Pinetop Logging Co. *Michael J. Brown* argued the cause for petitioner White Mountain Apache Tribe. With them on the briefs were *Leo R. Beus* and *Kathleen A. Rihr*.

Ian A. Macpherson, Assistant Attorney General of Arizona, argued the cause for respondents. With him on the brief were *Robert K. Corbin*, Attorney General, and *Anthony B. Ching*, Solicitor General.

Elinor Hadley Stillman argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne*, and *Robert L. Klarquist*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are once again called upon to consider the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation. The State of Arizona seeks to apply its motor carrier license and use fuel taxes to petitioner Pinetop Logging Co. (Pinetop), an enter-

prise consisting of two non-Indian corporations authorized to do business in Arizona and operating solely on the Fort Apache Reservation. Pinetop and petitioner White Mountain Apache Tribe contend that the taxes are pre-empted by federal law or, alternatively, that they represent an unlawful infringement on tribal self-government. The Arizona Court of Appeals rejected petitioners' claims. We hold that the taxes are pre-empted by federal law, and we therefore reverse.

I

The 6,500 members of petitioner White Mountain Apache Tribe reside on the Fort Apache Reservation in a mountainous and forested region of northeastern Arizona.[1] The Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U. S. C. § 476. The revenue used to fund the Tribe's governmental programs is derived almost exclusively from tribal enterprises. Of these enterprises, timber operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits.[2]

The Fort Apache Reservation occupies over 1,650,000 acres, including 720,000 acres of commercial forest. Approximately 300,000 acres are used for the harvesting of timber on a "sustained yield" basis, permitting each area to be cut every 20 years without endangering the forest's continuing productivity. Under federal law, timber on reservation land is owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress.

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[1] The Fort Apache Reservation was originally established as the White Mountain Reservation by an Executive Order signed by President Grant on November 9, 1871. By the Act of Congress of June 7, 1897, 30 Stat. 64, the White Mountain Reservation was divided into the Fort Apache and San Carlos Reservations.

[2] In 1973, for example, tribal enterprises showed a net profit of $1,667,091, $1,508,713 of which was attributable to timber operations.

Acting under the authority of 25 CFR § 141.6 (1979) and the tribal constitution, and with the specific approval of the Secretary of the Interior, the Tribe in 1964 organized the Fort Apache Timber Co. (FATCO), a tribal enterprise that manages, harvests, processes, and sells timber. FATCO, which conducts all of its activities on the reservation, was created with the aid of federal funds. It employs about 300 tribal members.

The United States has entered into contracts with FATCO, authorizing it to harvest timber pursuant to regulations of the Bureau of Indian Affairs. FATCO has itself contracted with six logging companies, including Pinetop, which perform certain operations that FATCO could not carry out as economically on its own.[3] Since it first entered into agreements with FATCO in 1969, Pinetop has been required to fell trees, cut them to the correct size, and transport them to FATCO's sawmill in return for a contractually specified fee. Pinetop employs approximately 50 tribal members. Its activities, performed solely on the Fort Apache Reservation, are subject to extensive federal control.

In 1971 respondents[4] sought to impose on Pinetop the two state taxes at issue here. The first, a motor carrier license tax, is assessed on "[e]very common motor carrier of property and every contract motor carrier of property." Ariz. Rev. Stat. Ann. § 40–641 (A)(1) (Supp. 1979). Pinetop is a "contract motor carrier of property" since it is engaged in "the transportation by motor vehicle of property, for compensation, on any public highway." § 40–601 (A)(1) (1974). The motor carrier license tax amounts to 2.5% of the carrier's gross receipts. § 40–641 (A)(1) (Supp. 1979). The second tax at issue is an excise or use fuel tax designed "[f]or the

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[3] FATCO initially attempted to perform some of its own logging and hauling operations but found itself unable to do these tasks economically.

[4] Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each entity.

purpose of partially compensating the state for the use of its highway." Ariz. Rev. Stat. Ann. § 28–1552 (Supp. 1979). The tax amounts to eight cents per gallon of fuel used "in the propulsion of a motor vehicle on any highway within this state." *Ibid.* The use fuel tax was assessed on Pinetop because it uses diesel fuel to propel its vehicles on the state highways within the Fort Apache Reservation.

Pinetop paid the taxes under protest,[5] and then brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads.[6] The Tribe agreed to reimburse Pinetop for any tax liability incurred as a result of its on-reservation business activities, and the Tribe intervened in the action as a plaintiff.[7]

Both petitioners and respondents moved for summary judgment on the issue of the applicability of the two taxes to Pinetop. Petitioners submitted supporting affidavits from the manager of FATCO, the head forester of the Bureau of Indian Affairs, and the Chairman of the White Mountain Apache Tribal Council; respondents offered no affidavits dis-

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[5] Between November 1971 and May 1976 Pinetop paid under protest $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes. Since that time it has continued to pay taxes pending the outcome of this case. Refund litigation is pending in state court with respect to the five other non-Indian contractors employed by the Tribe, and that litigation has been stayed pending the outcome of this suit.

[6] For purposes of this action petitioners have conceded Pinetop's liability for both motor carrier license and use fuel taxes attributable to travel on state highways within the reservation. Pinetop has maintained records of fuel attributable to travel on those highways, and computations would evidently be made in order to allocate a portion of the gross receipts taxable under the motor carrier license tax to state highways.

[7] When Pinetop contracted to undertake timber operations for FATCO in 1969, both Pinetop and FATCO believed that it would not be required to pay state taxes. After respondents assessed the taxes at issue, FATCO agreed to pay them to avoid the loss of Pinetop's services.

puting the factual assertions by petitioners' affiants. The trial court awarded summary judgment to respondents,[8] and the petitioners appealed to the Arizona Court of Appeals. The Court of Appeals rejected petitioners' pre-emption claim. 120 Ariz. 282, 585 P. 2d 891 (1978). Purporting to apply the test set forth in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), the court held that the taxes did not conflict with federal regulation of tribal timber, that the federal interest was not so dominant as to preclude assessment of the challenged state taxes, and that the federal regulatory scheme did not "occupy the field." The court also concluded that the state taxes would not unlawfully infringe on tribal self-government. The Arizona Supreme Court declined to review the decision of the Court of Appeals. We granted certiorari. 444 U. S. 823 (1980).

II

Although "[g]eneralizations on this subject have become . . . treacherous," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries, *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832).[9] See *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–483

[8] After the trial court entered summary judgment on the issue of the applicability of the state taxes, the case proceeded to trial on the state-law issue of the manner of calculating the motor vehicle license tax. Final judgment was entered for respondents on all issues after trial. The Arizona Court of Appeals reversed the decision of the Superior Court on the calculation of the motor vehicle license tax. 120 Ariz. 282, 291, 585 P. 2d 891, 900 (1978).

[9] The shift in approach is discussed in *Williams* v. *Lee*, 358 U. S. 217, 219 (1959); *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 71–75 (1962); and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973).

(1976); *New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885). At the same time we have recognized that the Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). See also *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 55–56 (1978). As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as " 'an anomalous one and of complex character,' " for despite their partial assimilation into American culture, the tribes have retained " 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' " *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 173 (1973), quoting *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886).

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. See *United States* v. *Wheeler*, *supra*, at 322–323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). See also *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 502 (1979); *Fisher*

v. *District Court*, 424 U. S. 382 (1976) (*per curiam*); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172, against which vague or ambiguous federal enactments must always be measured.

The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. *Moe* v. *Salish & Kootenai Tribes*, *supra*, at 475. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.[10] Ambiguities in federal

[10] For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975,

law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. See *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 174–175, and n. 13. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.[11] *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra.* At the same time any applicable regulatory interest of the State must be given weight, *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 171, and "automatic exemptions 'as a matter of constitutional law' " are unusual. *Moe* v. *Salish & Kootenai Tribes,* 425 U. S., at 481, n. 17.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. See *Moe* v. *Salish & Kootenai Tribes, supra, at* 480–481; *McClanahan* v. *Arizona State Tax Comm'n.* More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad

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25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 152 (1973), quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also *Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49 (1978). Cf. Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 56 Texas L. Rev. 1195 (1978).

[11] In the case of "Indians going beyond reservation boundaries," however, a "nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." *Mescalero Apache Tribe* v. *Jones, supra,* at 148–149.

policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra,* and *Williams* v. *Lee, supra,* with *Moe* v. *Salish & Kootenai Tribes, supra,* and *Thomas* v. *Gay,* 169 U. S. 264 (1898). Cf. *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 171; *Mescalero Apache Tribe* v. *Jones,* 411 U. S., at 148.

III

With these principles in mind, we turn to the respondents' claim that they may, consistent with federal law, impose the contested motor vehicle license and use fuel taxes on the logging and hauling operations of petitioner Pinetop. At the outset we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs. Under 25 U. S. C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation.[12]

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[12] Federal policies with respect to tribal timber have a long history. In *United States* v. *Cook,* 19 Wall. 591 (1874), and *Pine River Logging Co.* v. *United States,* 186 U. S. 279 (1902), the Court held that tribal members had no right to sell timber on reservation land unless the sale was related to the improvement of the land. At the same time the Court interpreted the governing statute as designed "to permit deserving Indians, who had no other sufficient means of support, to cut . . . a limited quantity of . . . timber . . . and to use the proceeds for their support . . . , provided that 10 percent of the gross proceeds should go to the stumpage or

Timber on Indian land may be sold only with the consent of the Secretary, and the proceeds from any such sales, less administrative expenses incurred by the Federal Government, are to be used for the benefit of the Indians or transferred to the Indian owner. Sales of timber must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406 (a). The statute specifies the factors which the Secretary must consider in making that determination.[13] In order to assure the continued productivity of timber-producing land on tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U. S. C. § 407. The Secretary is granted power to determine the disposition of the proceeds from timber sales. He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U. S. C. § 466.

Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting

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poor fund of the tribe, from which the old, sick and otherwise helpless might be supported." *Id.*, at 285–286.

The Attorney General interpreted the holding in *Cook* to mean that Indians had no right to reservation timber. See 19 Op. Atty. Gen. 194 (1888). This interpretation was overturned by Congress by Act of June 25, 1910, ch. 431, 36 Stat. 855, as amended, 25 U. S. C. § 407, and also repudiated in *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938). Thus, as the Court summarized in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420 (1939), "[u]nder . . . established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians." See 25 U. S. C. § 196; *United States* v. *Mitchell*, 445 U. S. 535 (1980).

[13] Those factors include "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." 25 U. S. C. § 406 (a).

and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 CFR § 141.3 (a)(3) (1979). The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8, 141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12, 141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber-cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber. In the present case, contracts between FATCO and Pinetop must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs.

25 CFR Part 162 (1979). Bureau roads are open to "[f]ree public use." § 162.8. Their administration and maintenance are funded by the Federal Government, with contributions from the Indian tribes. §§ 162.6–162.6a. On the Fort Apache Reservation the Forestry Department of the Bureau has required FATCO and its contractors, including Pinetop, to repair and maintain existing Bureau and tribal roads and in some cases to construct new logging roads. Substantial sums have been spent for these purposes. In its federally approved contract with FATCO, Pinetop has agreed to construct new roads and to repair existing ones. A high percentage of Pinetop's receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance.

In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their motor vehicle license and use fuel taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation.[14] There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify

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[14] In oral argument counsel for respondents appeared to concede that the asserted state taxes could not lawfully be applied to tribal roads and was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. Tr. of Oral Arg. 34–37. Contrary to respondents' position throughout the litigation and in their brief in this Court, counsel limited his argument to a contention that the taxes could be asserted on the roads of the Bureau of Indian Affairs. *Ibid.* For purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

the assessment of taxes for activities on Bureau and tribal roads within the reservation.

At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." 25 CFR § 141.3 (a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government. That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe* v. *Jones,* 411 U. S., at 151. The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably in reviewing or writing the terms of the contracts between FATCO and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.

Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-

yield management policies imposed by federal law. Substantial expenditures are paid out by the Federal Government, the Tribe, and its contractors in order to undertake a wide variety of measures to ensure the continued productivity of the forest. These measures include reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest. The expenditures are largely paid for out of tribal revenues, which are in turn derived almost exclusively from the sale of timber. The imposition of state taxes on FATCO's contractors would effectively diminish the amount of those revenues and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses.

As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28–1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement

to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Williams* v. *Lee*, 358 U. S. 217 (1958); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971). The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. " 'The cases in this Court have consistently guarded the authority of Indian governments over their reservations.' " *United States* v. *Mazurie*, 419 U. S., at 558, quoting *Williams* v. *Lee*, *supra*, at 223. Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.[15] Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.[16]

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[15] Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), leaves no room for the additional burdens sought to be imposed by state law.

[16] Respondents also contend that the taxes are authorized by the Buck Act, 4 U. S. C. § 105 *et seq.*, and the Hayden-Cartwright Act, 4 U. S. C. § 104. In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*, at 691,

Both the reasoning and result in this case follow naturally from our unanimous decision in *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra.* There the State of Arizona sought to impose a "gross proceeds" tax on a non-Indian company which conducted a retail trading business on the Navajo Indian Reservation. Referring to the tradition of sovereign power over the reservation, the Court held that the "comprehensive federal regulation of Indian traders" prohibited the assessment of the attempted taxes. *Id.*, at 688. No federal statute by its terms precluded the assessment of state tax. Nonetheless, the "detailed regulations," specifying "in the most minute fashion," *id.*, at 689, the licensing and regulation of Indian traders, were held "to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.*, at 690. The imposition of those burdens, we held, "could . . . disturb and disarrange the statutory plan" because the economic burden of the state taxes would eventually be passed on to the Indians themselves. *Id.*, at 691. We referred to the fact that the Tribe had been "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Id.*, at 690. And we emphasized that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Id.*, at 691. The present case, we conclude,

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n. 18, we squarely held that the Buck Act did not apply to Indian reservations, and respondents present no sufficient reason for us to depart from that holding. We agree with petitioners that the Hayden-Cartwright Act, which authorizes state taxes "on United States military or other reservations," was not designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber. We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all.

is in all relevant respects indistinguishable from *Warren Trading Post.*

The decision of the Arizona Court of Appeals is

Reversed.

[For concurring opinion of MR. JUSTICE POWELL, see *post,* p. 170.]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The State of Arizona imposes use fuel and motor carrier license taxes on certain businesses in order to compensate it for their greater than normal use of public roads. See *post,* at 174, n. 3 (POWELL, J., concurring). The issue originally presented to this Court was whether the State was prohibited from imposing such taxes on a non-Indian joint venture (Pinetop Logging Co.) hired by the petitioner Tribe to perform logging operations on the Fort Apache Reservation, when the taxes were based on Pinetop's use of roads located solely within the reservation. In light of the concessions made by both sides at various stages of the litigation, however, I doubt that we should reach that issue in this case. Moreover, even if the merits were properly before us, I could not agree with the Court's determination that the state taxes are pre-empted by federal law.

Between November 1971 and May 1976, Pinetop paid under protest use fuel taxes of $19,114.59 and motor carrier license taxes of $14,701.42. The Arizona Court of Appeals determined that the latter assessment improperly denied Pinetop a 60% credit to which it was entitled under state law.[1] After allowance for that credit, the total amount of the disputed taxes for the 4½-year period is reduced to about $25,000 or $5,000–$6,000 per year.

[1] Under Arizona law, logging operations are exempt from the motor carrier license tax if the wood they haul is used for pulpwood. In this case 60% of the logs hauled by Pinetop were to be used for pulpwood.

The taxes actually in dispute, however, are considerably less. Pinetop concedes that some of its operations are subject to tax and the State concedes that Pinetop is entitled to additional credits. To understand these concessions it is necessary to note that Pinetop's vehicles operate on four different kinds of roads within the Fort Apache Reservation: (1) state highways; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) tribal roads exclusively financed and maintained by the Indians; and (4) private logging roads built and maintained by loggers such as Pinetop.[2]

Although Pinetop represents that its use of the Arizona state highways within the reservation is extremely limited, it does not dispute its tax liability for such use. On the other hand, in this Court the State expressly conceded that its assessments were improper under state law to the extent that they applied to operations on either private logging roads[3]

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[2] In paragraph XIII of their complaint, petitioners alleged:

"There are four categories of roads in the Ft. Apache Indian Reservation which are used by the Plaintiffs in their logging operations: (1) tribal roads financed and maintained by the Indians exclusively; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) state highways; and (4) logging roads built and maintained by loggers. In transporting timber from the woods to the sawmill, plaintiffs' vehicles travel substantially over tribal and BIA roads, although short portions of many of the trips are on state highways.

"The only category of roads on the Fort Apache Indian Reservation which are built or maintained by the State of Arizona, is category (3), state highways. Categories (1), (2), and (4) are financed and maintained by sources other than monies from the State of Arizona. Tribal, BIA and logging roads are not public highways within the meaning of Arizona Revised Statutes Sec. 40–601.9, and thus any use fuel and license motor carrier taxes on these roads are inappropriate."

[3] At oral argument, the Assistant Attorney General of the State of Arizona stated:

"But so long as the road remained a private thoroughfare they would not be so traveled and use of those road [*sic*] would not be subject to the State tax." Tr. of Oral Arg. 32.

or tribal roads.[4] If it is conceded that the State may tax Pinetop's use of public roads maintained by the State and may not tax the use of tribal or private roads, the question that arises is whether the public roads maintained by the

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Later in the argument he was asked the following question and gave the following answer:

"Mr. Macpherson, quite apart from the question in this case which involves Indian tribes, what about a private owner of land—whether it is the Weyerhauseur Company or a rancher who owns many square miles of ranch land, does Arizona impose a tax upon his fuel if the vehicle that he owns is used exclusively on his own private property 365 days a year, or this year 366, and never on the public roads of Arizona?

"MR. MACPHERSON: It does not, Your Honor." *Id.*, at 39.

[4] With respect to tribal roads, the Assistant Attorney General advised the Court at oral argument:

"However, the fact of the matter is that under current State law, under the legislative scheme that exists in Arizona right now, Arizona has no intention of going forward on some purported theory that because the Court of Appeals decision says we can, that we can go ahead and tax use on these tribal roads. I have been assured of that by my client by telephone last night. And other than that we would put that before the Court to apprise the court of what the true facts are." *Id.*, at 35.

In rebuttal, counsel for petitioners expressed surprise at, but nevertheless accepted, the concession made by the State. Counsel stated:

"My good friend, Mr. Macpherson, has just said some remarkable things.

"I think I hear him saying that the State is no longer interested in collecting taxes from tribal roads on the reservation which are not Bureau of Indian Affairs roads. If that is what he said, then I am delighted to accept him accept his concession. But I must also correct some of the suggestions he has made.

"His predecessor, the Attorney for the State of Arizona, argued in the State appellate courts that the State was claiming the right to tax tribal roads. The judgment of the lower court gives the State the right to tax tribal roads. And that is the judgment we are burdened with and that is the judgment which we bring to this Court.

"Our opening briefs state that is the issue. Their briefs acknowledge that is the issue . . . and that was the issue before the Court.

. . . . .

"Trial counsel, Mr. Beus who is here, informs me over the lunch period

Bureau of Indian Affairs are more akin to the former or to the latter. It appears that the BIA roads are like the state highways insofar as they are open to use by the general public.[5] On the other hand, it also appears that they were constructed

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that his understanding was that administrative agreement included the payment of certain taxes allocable to tribal roads.

"QUESTION: Well, as I say, that is of some importance, at least to me, whether there is an issue to taxes, either fuel or gross receipts taxes imposed on vehicles insofar as their use was confined to tribal roads.

"Is there, or is there not a dispute?

"MR. WAKE: I submit there was until Mr. Macpherson spoke.

"QUESTION: Well, now you submit there isn't. And I—

"MR. WAKE: I submit there isn't because [counsel] has conceded the issue or [is] withdrawing the issue. And perhaps he can clarify his remarks.

"QUESTION: You say you accept it gladly.

"MR. WAKE: I accept it gladly but—

"QUESTION: You have won your case on the—

"MR. WAKE: Your Honor, I would point out that that being the concession as I understand it, it would be appropriate in any event the judgment of the lower court to be correct in that regard since—" *Id.*, at 54–56.

[5] The following colloquy occurred at oral argument:

"QUESTION: What I meant to say is your real fight is over the right to tax on BIA roads.

"Does the record tell us much about those roads, for example does it tell us whether the State police are on those roads or whether they have speed limits or things like that?

"MR. MACPHERSON: Your Honor, the record does not specifically go into that much detail.

"QUESTION: However, it presents us with a hypothetical case quite different from the one you asked us to decide.

"MR. MACPHERSON: Well, Mr. Justice Stevens, the case is—we felt it necessary as an ethical consideration to apprise the Court of what the actual situation is.

"But, having said that, the issue, the legal issue, if it please the Court, may still be decided with respect to the BIA road use. The fact of the matter is that BIA roads pursuant to Federal—the Code of Federal Regulations are required to be open to free public use, as a matter of Federal law." *Id.*, at 36–37.

and maintained by the Federal Government and are policed by federal and tribal officers.[6]

Under these circumstances I think the most appropriate disposition would be to vacate the judgment of the Arizona Court of Appeals and remand for further consideration in light of the concessions made on behalf of the State in this Court. As the Court and MR. JUSTICE POWELL point out, it is difficult to see why those concessions are not an acknowledgment that the State has no authority to tax the use of roads in which it has no interest. See *ante*, at 148, n. 14 (opinion of the Court); *post*, at 174 (POWELL, J., concurring). If the state court were given an opportunity to focus on this point, we might well find that there is no remaining federal issue to be decided.

Even assuming, however, that the state courts would uphold the imposition of taxes based on the use of BIA roads, despite their similarities to private and tribal roads, I would not find those taxes to be pre-empted by federal law. In *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685, the Court held that state taxation of a non-Indian doing business with a tribe on the reservation was pre-empted because the taxes threatened to "disturb and disarrange" a pervasive scheme of federal regulation and because there was no governmental interest on the State's part in imposing such a burden. See *Central Machinery Co.* v. *Arizona State Tax Comm'n*, *post*, at 168 (STEWART, J., dissenting). In this case we may assume, *arguendo*, that the second factor relied

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[6] "QUESTION: Did I understand you to say that Arizona has no responsibility for maintaining the BIA roads?

"MR. MACPHERSON: This is correct, Your Honor.

"QUESTION: And did it contribute to the construction of those roads?

"MR. MACPHERSON: So far as the record shows, it did not, Your Honor.

"QUESTION: And no police responsibility, either?

"MR. MACPHERSON: That is correct, Your Honor. . . ." *Id.*, at 41–42.

upon in *Warren Trading Post* is present. As a result, Pinetop may well have a right to be free from taxation as a matter of due process or equal protection.[7] But I cannot agree that it has a right to be free from taxation because of its business relationship with the petitioner Tribe.

As the Court points out, the Federal Government has imposed a detailed scheme of regulation on the tribal logging business. Thus, among other things, the BIA approves and sometimes drafts contracts between the Tribe and non-Indian logging companies such as Pinetop and requires the Tribe and its contractors to follow BIA's dictates as to where to cut, haul, and mark timber, and as to which roads to construct and repair. *Ante*, at 148, n. 14. The Court reasons that, because the imposition of state taxes on non-Indian contractors is likely to increase the price of their services to the Tribe and thus decrease the profitability of the tribal enterprise, the taxes would substantially interfere with this scheme. Thus, the Court states that the taxes threaten the "overriding federal objective" of guaranteeing Indians all the profits the forest is capable of yielding, "undermine" the Federal Government's ability to set fees and rates with respect to non-Indian contractors, and "adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Ante*, at 149–150.

From a practical standpoint, the Court's prediction of massive interference with federal forest-management programs seems overdrawn, to say the least. The logging operations involved in this case produced a profit of $1,508,713 for the Indian tribal enterprise in 1973. As noted above, the maximum annual taxes Pinetop would be required to pay would

[7] The Due Process Clause may prohibit a State from imposing a tax on the use of completely private roads if the tax is designed to reimburse it for use of state-owned roads. Or it may be that once the State has decided to exempt private roads from its taxing system, it is also required, as a matter of equal protection, to exempt other types of roads that are identical to private roads in all relevant respects.

be $5,000–$6,000 or less than 1% of the total annual profits. Given the State's concession in this Court that the use of certain roads should not have been taxed as a matter of state law, the actual taxes Pinetop would be required to pay would probably be considerably less.[8] It is difficult to believe that these relatively trivial taxes could impose an economic burden that would threaten to "obstruct federal policies."

Under these circumstances I find the Court's reliance on the indirect financial burden imposed on the Indian Tribe by state taxation of its contractors disturbing. As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. See *United States* v. *Detroit*, 355 U. S. 466, 469; cf. *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134. In *Warren Trading Post* the Court found an exception to this rule where Congress had chosen to regulate the relationship between an Indian tribe and a non-Indian trader to such an extent that there was no room for the additional burden of state taxation. In this case, since the state tax is unlikely to have a serious adverse impact on the tribal business, I would not infer the same congressional intent to confer a tax immunity. Although this may be an appropriate way in which to subsidize Indian industry and encourage Indian self-government, I would require more explicit evidence of congressional intent than that relied on by the Court today.

I respectfully dissent.

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[8] The parties have not told us what portion of the taxes is attributable to the use of each of the various types of roads. Thus, we cannot determine how much tax Pinetop would be required to pay for its use of BIA roads.

CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 78–1604. Argued January 14, 1980—Decided June 27, 1980

Held: Arizona had no jurisdiction to impose a tax on appellant Arizona corporation's sale of farm machinery to an Indian tribe, where the sale took place on an Indian reservation even though appellant did not have a permanent place of business on the reservation and was not licensed to trade with Indians. Since the transaction was plainly subject to regulation under the federal statutes and implementing regulations governing the licensing of Indian traders, federal law pre-empts the asserted state tax. It is irrelevant that appellant was not a licensed Indian trader, since it is the existence of the Indian trader statutes, not their administration, that pre-empts the field of transactions with Indians occurring on reservations. Nor is it relevant that appellant did not maintain a permanent place of business on the reservation, since the Indian trader statutes and regulations apply no less to a nonresident who sells goods to Indians on a reservation than they do to a resident trader. The purpose of these statutes and regulations to protect Indians from becoming victims of fraud in dealings with sellers of goods would be easily circumvented if a seller could avoid federal regulations simply by failing to adopt a permanent place of business on a reservation or to obtain a federal license. Pp. 163–166.

121 Ariz. 183, 589 P. 2d 426, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which POWELL, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 166. POWELL, J., filed a dissenting opinion, *post*, p. 170.

Rodney B. Lewis argued the cause for appellant. With him on the briefs were *Richard B. Collins, Jeanne S. Whiteing,* and *Z. Simpson Cox.*

Ian A. Macpherson, Assistant Attorney General of Arizona, argued the cause for appellee. With him on the brief was *Robert K. Corbin,* Attorney General.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman,* and *Robert L. Klarquist.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a State may tax the sale of farm machinery to an Indian tribe when the sale took place on an Indian reservation and was made by a corporation that did not reside on the reservation and was not licensed to trade with Indians.

I

Appellant is a corporation chartered by and doing business in Arizona. In 1973 it sold 11 farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe. The Tribe is federally recognized and is governed by a constitution adopted pursuant to the Indian Reorganization Act, 25 U. S. C. § 476. Gila River Farms conducts farming operations on tribal and individual trust land within the Gila River Reservation, which was established in Arizona by the Act of Feb. 28, 1859, ch. 66, 11 Stat. 388, 401.

Appellant's salesman solicited the sale of these tractors on the reservation, the contract was made there, and payment for and delivery of the tractors also took place there. Appellant does not have a permanent place of business on the reservation, and it is not licensed under 25 U. S. C. §§ 261–264 and 25 CFR Part 251 (1979) to engage in trade with Indians on reservations. The transaction was approved, however, by the Bureau of Indian Affairs.

The State of Arizona imposes a "transaction privilege tax" on the privilege of doing business in the State. Ariz. Rev. Stat. Ann. §§ 42–1309, 42–1312, 42–1361 (Supp. 1979).[1]

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[1] At the time of the transaction in question, Ariz. Rev. Stat. Ann. § 42–1309 (Supp. 1979) provided:

"A. There is levied and there shall be collected . . . privilege taxes measured by the amount or volume of business transacted by persons on

The tax amounts to a percentage of the gross receipts of the taxable entity. The tax is assessed against the seller of goods, not against the purchaser. In this case, appellant added the amount of this tax—$2,916.62—as a separate item to the price of the tractors, thereby increasing by that amount the total purchase price paid by Gila River Farms. Appellant paid this tax to the State under protest and instituted state administrative proceedings to claim a refund.[2] The administrative claim was denied, and appellant then filed this action in state court, contending that federal regulation of Indian trading pre-empted application of the state tax to the transaction in question. The Superior Court for Maricopa County held that the State had no jurisdiction to tax the transaction, and accordingly it ordered a refund. The Supreme Court of Ari-

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account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42–1310 through 42–1315."

At the time of the transaction, Ariz. Rev. Stat. Ann. § 42–1312 (Supp. 1979) provided:

"A. The tax imposed by subsection A of § 42–1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. . . ."

At the time of the transaction, Ariz. Rev. Stat. Ann. § 42–1361 (Supp. 1973) provided:

"A. There is levied and shall be collected by the department of revenue a tax:

"1. On the privilege of doing business in this state, measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application, against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the provisions and schedules as set forth in [§ 42–1301 *et seq.*], at rates equal to fifty per cent of the rates imposed in such article." 1973 Ariz. Sess. Laws, ch. 123, § 117.

[2] It is stipulated that appellant will pay over any tax refund to Gila River Farms.

zona reversed. *State* v. *Central Machinery Co.*, 121 Ariz. 183, 589 P. 2d 426 (1978).

We noted probable jurisdiction, 444 U. S. 822 (1979), and now reverse.

II

In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent "fraud and imposition" upon them. H. R. Rep. No. 474, 23d Cong., 1st Sess., 11 (1834) (Committee Report with respect to Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729). In the current regulatory scheme, the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make . . . rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U. S. C. § 261. All persons desiring to trade with Indians are subject to the Commissioner's authority. 25 U. S. C. § 262. The President is authorized to prohibit the introduction of any article into Indian land. 25 U. S. C. § 263. Penalties are provided for unlicensed trading, introduction of goods, or residence on a reservation for the purpose of trade. 25 U. S. C. § 264. The Commissioner has promulgated detailed regulations to implement these statutes. 25 CFR Part 251 (1979).

In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), the Court unanimously held that these "apparently all-inclusive regulations and the statutes authorizing them," *id.*, at 690, prohibited the State of Arizona from imposing precisely the same tax as is at issue in the present case on the operator of a federally licensed retail trading post located on a reservation. We determined that these regulations and statutes are "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so

fully in hand that no room remains for state laws imposing additional burdens upon traders." *Ibid.* We noted that the Tribe had been left "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Ibid.* See *White Mountain Apache Tribe* v. *Bracker, ante,* at 152.

There are only two distinctions between *Warren Trading Post, supra,* and the present case: appellant is not a licensed Indian trader, and it does not have a permanent place of business on the reservation.[3] The Supreme Court of Arizona concluded that these distinctions indicated that federal law did not bar imposing the transaction privilege tax on appellant. We disagree.

The contract of sale involved in the present case was executed on the Gila River Reservation, and delivery and payment were effected there. Under the Indian trader statutes, 25 U. S. C. §§ 261–264, this transaction is plainly subject to federal regulation. It is irrelevant that appellant is not a licensed Indian trader. Indeed, the transaction falls squarely within the language of 25 U. S. C. § 264, which makes

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[3] It is irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself. See *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 157, n. 13 (1973). Nor may appellee distinguish the present case from *Warren Trading Post* by contending that the tax at issue in this case falls upon the seller of goods and not the buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. The tax at issue in the present case is precisely the same tax as was involved in *Warren Trading Post.* The argument made by appellee in the present case was used by the Supreme Court of Arizona in *Warren Trading Post* to uphold imposition of the tax. *Warren Trading Post Co.* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809 (1963). Our reversal of that decision recognized that, regardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission." 380 U. S., at 691. See *id.,* at 686, and n. 1.

it a criminal offense for "[a]ny person . . . to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation." It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.[4]

Nor is it relevant that appellant did not maintain a permanent place of business on the reservation. The Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader. See 25 U. S. C. § 262 ("[a]ny person desiring to trade with the Indians on any Indian reservation" subject to regulatory authority of Commissioner of Indian Affairs); 25 U. S. C. § 263 ("President is authorized . . . to prohibit the introduction of goods . . . into the country belonging to any Indian tribe"); 25 U. S. C. § 264 (making it an offense for "[a]ny person" to introduce goods or to trade on a reservation without a license). Indeed, an implementing regulation expressly provides for the licensing of "itinerant peddlers," 25 CFR § 251.9 (b) (1979), who are by definition nonresidents, see 25 CFR § 252.3 (i) (1979). One of the fundamental purposes of these statutes and regulations—to protect Indians from becoming victims of fraud in dealings with persons selling goods—would be easily circumvented if a seller could avoid federal regulation simply by failing to adopt a permanent place of business on a reservation or by failing to obtain a federal license.

Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax. As we held in *Warren Trading Post, supra,* at

[4] In any event, it should be recognized that the transaction at issue in this case was subjected to comprehensive federal regulation. Although appellant was not licensed to engage in trading with Indians, the Bureau of Indian Affairs had approved both the contract of sale for the tractors in question and the tribal budget, which allocated money for the purchase of this machinery.

691, n. 18, by enacting these statutes Congress "has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them "a sweep as broad as [their] language," *United States* v. *Price*, 383 U. S. 787, 801 (1966), and interpret them in light of the intent of the Congress that enacted them, see *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 666 (1979); *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978).[5]

The decision of the Supreme Court of Arizona is

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

The question before us is whether the appellant is immune from a state tax imposed on the proceeds of the sale by it of farm machinery to an Indian tribe. The Court concludes that an affirmative answer is required by the rationale of *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, a case that is similar in some respects to this one. While I agree that *Warren Trading Post* states the relevant legal principles, I cannot agree that those principles lead to the result reached by the Court in this case. Accordingly, I dissent.

In *Warren Trading Post*, the Court held that the State of Arizona may not impose the same tax involved here on the operator of a federally licensed retail trading business located on an Indian reservation. The Court determined that

[5] We decline appellee's invitation to re-examine our conclusion in *Warren Trading Post*, 380 U. S., at 691, n. 18, that the Buck Act, 4 U. S. C. §§ 105–110, does not permit States to tax transactions on Indian reservations.

the "apparently all-inclusive [federal] regulations and the statutes authorizing them," *id.*, at 690, under which the trader in that case had been licensed, were "in themselves sufficient to show that Congress has taken the business of trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders," *ibid.*

As the Court recognizes, the circumstances of this case differ from those presented by *Warren Trading Post*. Specifically, the appellant here is not a licensed Indian trader and does not have a permanent place of business on the reservation. See *ante*, at 164. The Court considers these differences immaterial, however, apparently because, as it reads the relevant statutes, the appellant *could* have been subjected to regulation somewhat like that in *Warren Trading Post*, though in fact it was not. Thus the Court relies on 25 U. S. C. § 264, which makes it unlawful for "[a]ny person . . . to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation."

Even assuming that the Court correctly reads the statutory language to reach anybody who sells goods "on any Indian reservation," I cannot understand why the Court ascribes to that fact the significance that it does. The question, after all, is not whether the appellant may be required to have a license, but rather, as the Arizona Supreme Court correctly believed, whether the state tax "runs afoul of any congressional enactments" dealing with the affairs of reservation Indians, *State* v. *Central Machinery Co.*, 121 Ariz. 183, 184, 589 P. 2d 426, 427 (1978). This Court has consistently recognized that "'[e]nactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation,] of such state laws as conflict with the federal enactments,'" *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 483, quoting *United States* v. *McGowan*, 302 U. S. 535, 539.[1] With regard to the determinative issue

[1] As MR. JUSTICE POWELL observes in his dissenting opinion, *post*, at 172, the Court in *Moe* v. *Salish & Kootenai Tribes* rejected the contention that

whether Arizona's tax in this case is inconsistent with federal law, the Court says only that "[i]t is the existence of the Indian trader statutes . . . that pre-empts the field of transactions with Indians occurring on reservations," *ante*, at 165, and that those statutes must be given "'a sweep as broad as [their] language,'" *ante*, at 166, quoting *United States* v. *Price*, 383 U. S. 787, 801.[2]

But the rationale of the decision in *Warren Trading Post*, *supra*, was not so simple as this. The grounds of that decision were twofold. First, as the Court today reiterates, a tax on the gross income of a licensed trader residing on the reservation could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable," *id.*, at 691. Second, the Court saw in that case no governmental justification to support the State's "put[ting] financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed," *ibid.* Because Congress for nearly a century had "left the Indians . . . free to run the reservation and its affairs without state control," Arizona had been "automatically relieved . . . of all burdens for carrying on those same responsibilities," *id.*, at 690. That being so, the Court did not "believe that Congress intended to leave to the State the privilege of levying this tax," *id.*, at 691.

Neither of these considerations is present here. First, although the appellant was obliged to obtain federal approval of the sale transaction in this case, see 25 U. S. C. §§ 262, 264, it was not subjected to the much more comprehensive regulation that governs licensed traders engaged in a continuous course of dealing with reservation Indians. See 25 CFR

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the Indian trader statutes occupy the field so completely as to pre-empt all state laws affecting those who trade on the reservation with reservation Indians.

[2] The Court's construction of the trader statutes, in fact, sweeps far more broadly than their language, no portion of which indicates a congressional intention to immunize anybody from state taxation.

Part 251 (1979). In these circumstances, the Court's expressed belief that the minimal regulation to which the appellant was subject "leaves no room" for the state tax in this case strikes me as hyperbolic. Even were the appellant administratively required to possess a license, taxation of an isolated sale by it to the Indians simply would not jeopardize those federal and tribal interests involved in the thorough regulation of on-reservation merchants trading continuously with the Indians—the situation dealt with in *Warren Trading Post*. There the financial burdens of state taxation would have impaired the Commissioner's ability to prescribe "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians," 25 U. S. C. § 261, and might have threatened the very existence of the resident trader's enterprise, on which the tribe depended for its essential commerce. No similar risks exist in a case such as this one, involving an isolated sales transaction. The viability of the seller may be assumed from its willingness to trade, and the reasonableness of the terms of sale may be guaranteed, as they were in this case, by the Commissioner's review of them. It is true that the prices paid by the Indians might be lower if the appellant is immune from the tax. But that is hardly relevant. The Court has on more than one occasion sustained state taxation of transactions occurring on Indian reservations, notwithstanding the fact that the economic burden of the tax fell indirectly on the Indian tribe or its members. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 151, 156–157; *Moe* v. *Salish & Kootenai Tribes, supra.* Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148.

Second, the Court inexplicably ignores the State's wholly legitimate purpose in taxing the appellant, a corporation that does business within the State at large and presumably derives substantial benefits from the services provided by the State at taxpayer's expense.[3] Aside from entering the reser-

[3] "The State also has a legitimate governmental interest in raising

vation to solicit and execute the contract of sale and to receive payment, circumstances that are certain to characterize all sales to reservation Indians after today's decision, the appellant conducts its affairs in all respects like any other business to which the State's nondiscriminatory tax concededly applies. Thus, quite unlike the circumstances in *Warren Trading Post*, the State in this case has not been relieved of all duties or responsibilities respecting the business it would tax. Yet, despite the settled teaching of the Court's decisions in this area that every relevant state interest is to be given weight, see *Washington* v. *Confederated Tribes of Colville Indian Reservation, supra; McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 171; cf. *White Mountain Apache Tribe* v. *Bracker, ante*, at 144, the Court does not even consider the State's valid governmental justification for taxing the transaction here involved.

It is important to recognize the limits inherent in the principles of federal pre-emption on which the *Warren Trading Post* decision rests. Those limits make necessary in every case such as this a careful inquiry into pertinent federal, tribal, and state interests, without which a rational accommodation of those interests is not possible. Had such an inquiry been made in this case, I am convinced the Court could not have concluded that Arizona's exercise of the sovereign power to tax its non-Indian citizens had been pre-empted by federal law.

MR. JUSTICE POWELL, dissenting in No. 78–1604 (*ante*, p. 160) and concurring in No. 78–1177 (*ante*, p. 136).

I write separately because I would distinguish *Central Machinery Co.* v. *Arizona State Tax Comm'n, ante*, p. 160, from *White Mountain Apache Tribe* v. *Bracker, ante*, p. 136.

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revenues, and that interest is likewise strongest when the tax is directed at [economic value created off of the reservation] and when the taxpayer is the recipient of state services." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 157.

I agree with the Court that a non-Indian contractor continuously engaged in logging upon a reservation is subject to such pervasive federal regulation as to bring into play the preemption doctrine of *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965). But *Warren Trading Post* simply does not apply to routine state taxation of a non-Indian corporation that makes a single sale to reservation Indians. I therefore join the Court's opinion in *White Mountain Apache Tribe*, but I dissent from its decision in *Central Machinery*.

I

Central Machinery

Warren Trading Post held that Arizona could not levy its transaction privilege tax against a company regularly engaged in retail trading with the Indians upon a reservation. The company operated under a federal license, and it was subject to the federal regulatory scheme authorized by 25 U. S. C. §§ 261–264. "These apparently all-inclusive regulations," the Court concluded, "show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U. S., at 690.

The Court today is too much persuaded by the superficial similarity between *Warren Trading Post* and *Central Machinery*. The Court mistakenly concludes that a company having no license to trade with the Indians and no place of business within a reservation is engaged in "the business of Indian trading on reservations. . . ." 380 U. S., at 690. Although "[a]ny person" desiring to sell goods to Indians inside a reservation must secure federal approval, see 25 U. S. C. §§ 262, 264, the federal regulations—and the facts of this case—show that a person who makes a single approved sale need not become a fully regulated Indian trader. Even itinerant peddlers who engage in a pattern of selling within a reservation are merely "considered as traders" for purposes

of the licensing requirement. 25 CFR § 251.9 (b) (1979). "The business of a licensed trader," in fact, "must be managed by the bonded principal, who must habitually reside upon the reservation. . . ." 25 CFR § 251.14 (1979).[1] Since *Warren Trading Post* involved a resident trader subject to the complete range of federal regulation, the Court had no occasion to consider whether federal regulation also pre-empts state taxation of a seller who enters a reservation to make a single transaction.[2]

Our most recent cases undermine the notion that 25 U. S. C. §§ 261–264 occupy the field so as to pre-empt all state regulation affecting licensed Indian traders. The unanimous Court in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–483 (1976), concluded that a State could require tribal retailers to prepay a tax validly imposed on non-Indian customers. Rejecting an argument based on *Warren Trading Post*, the Court concluded that federal laws "'passed to protect and guard [the Indians] only affect the operation, within the [reservation], of such state laws as conflict with the federal enactments.'" 425 U. S., at 483, quoting *United States* v. *McGowan*, 302 U. S. 535, 539 (1938). In *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S.

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[1] The regulation dealing with itinerant peddlers was promulgated after the decision in *Warren Trading Post*. See 30 Fed. Reg. 8267 (1965). Thus, the regulations before the Court in *Warren Trading Post* required all licensed Indian traders to conduct their businesses under the management of a habitual resident upon the reservation. 25 CFR § 251.14 (1958).

[2] At oral argument, counsel for Central Machinery conceded that the State could have taxed the transaction in question if it had been completed at the firm's usual place of business. Tr. of Oral Arg. 7. Thus, Central Machinery's argument reduces to the proposition that the locus of the transaction is dispositive. Quite apart from the opportunities for tax evasion that it creates, this position is unsound. Persons who make an unauthorized sale to Indians upon a reservation can be prosecuted. 25 U. S. C. § 264; see *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon*, 585 F. 2d 978 (CA10 1978). But that certainly does not prove that all persons who make an authorized sale are subject to the pervasive regulation considered in *Warren Trading Post*.

134, 159–160 (1980), the Court holds that a State can require licensed traders to keep detailed tax records of their sales to both Indians and non-Indians. Cf. *Confederated Tribes* v. *Washington,* 446 F. Supp. 1339, 1347, 1358–1359 (ED Wash. 1978) (three-judge court).

Finally, unlike taxes imposed upon an Indian trader engaged in a continuous course of dealing within the reservation, the tax assessed against Central Machinery does not "to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians . . . except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren Trading Post, supra,* at 691. In this case, the Bureau of Indian Affairs approved all aspects of the only sale Central Machinery made to the Gila River Indian Tribe. The contract price approved by the Bureau included costs attributable to the very tax that Central Machinery now seeks to recover. *Ante,* at 161–162. Thus, the State's tax did not interfere with "the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable. . . ." *Warren Trading Post, supra,* at 691. Since a seller not licensed to trade with the Indians must secure specific federal approval for each isolated transaction, there is no danger that ordinary state business taxes upon the seller will impair the Bureau's ability to prevent fraudulent or excessive pricing. To hold the seller immune from state taxes otherwise due upon a single transaction with the Indians gives the non-Indian seller a windfall or the Indian buyer an unwarranted advantage over all others who deal with the seller.

II

White Mountain Apache Tribe

White Mountain Apache Tribe presents a different situation. Petitioner Pinetop Logging Co. operates solely and continuously upon an Indian reservation under its contract

with a tribal enterprise. Pinetop's daily operations are controlled by a comprehensive federal regulatory scheme designed to assure the Indian tribes the greatest possible return from their timber. Federal officials direct Pinetop's hauling operations down to such details as choice of equipment, selection of routes, speeds of travel, and dimensions of the loads. *Ante*, at 146–148. Pinetop does all of the hauling at issue in this case over roads constructed, maintained, and regulated by the White Mountain Apache Tribe and the Bureau of Indian Affairs. The Bureau requires the Tribe and its contractors to repair existing roads and to construct new roads necessary for sustained logging. Pinetop exhausts a large percentage of its gross income in performing these contractual obligations. *Ante*, at 148.

Since the Federal Government, the Tribe, and its contractors are solely responsible for the roads that Pinetop uses, I "cannot believe that Congress intended to leave to the State the privilege of levying" road use taxes upon Pinetop's operations. See *Warren Trading Post*, 380 U. S., at 691. The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control. See *Washington* v. *Confederated Tribes*, *supra*, at 162–164.[3] The addition of these taxes to the road construction and repair expenses that Pinetop already bears also would interfere with the federal scheme for maintaining roads essential to successful Indian timbering. See 380 U. S., at

[3] The motor carrier license tax imposed by Ariz. Rev. Stat. Ann. § 40–641 (Supp. 1979) is a tax on the privilege of engaging in a business that makes inordinate use of public roads. See *Purolator Security, Inc.* v. *Thorneycroft*, 116 Ariz. 394, 396–397, 569 P. 2d 824, 826–827 (1977); *Campbell* v. *Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P. 2d 118, 121 (1966). All revenues from this tax are earmarked for maintenance and improvement of the State's highways. Ariz. Rev. Stat. Ann. § 40–641 (C) (Supp. 1979). The fuel use excise tax imposed by Ariz. Rev. Stat. Ann. § 28–1551 (Supp. 1979) is "for the purpose of partially compensating the state for the use of its highways." § 28–1552 (Supp. 1979).

691. The Tribe or its contractors would pay twice for use of the same roads. This double exaction could force federal officials to reallocate work from non-Indian contractors to the tribal enterprise itself or to make costly concessions to the contractors. I therefore join the Court in concluding that this case "is in all relevant respects indistinguishable from *Warren Trading Post*." *Ante*, at 153.

DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-669. Argued April 21, 1980—Decided June 27, 1980

Title 35 U. S. C. § 271 (c) provides that "[w]hoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." Section 271 (d) provides that "[n]o patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement." Respondent chemical manufacturer obtained a patent on the method or process for applying propanil, a chemical compound herbicide, to inhibit the growth of undesirable plants in rice crops. Propanil is a nonstaple commodity that has no use except through practice of the patented method. Petitioners manufactured and sold propanil for application to rice crops, with directions to purchasers to apply the propanil in accordance with respondent's patented method. Respondent filed suit in Federal District Court, seeking injunctive relief and alleging that petitioners contributed to infringement of its patent rights by farmers who purchased and used petitioners' propanil and that petitioners induced such infringement by instructing the farmers how to apply the herbicide. Petitioners responded by requesting licenses for the patented method, but when respondent refused to grant licenses, petitioners raised a defense of patent misuse, claiming that there had been misuse because respondent had "tied" the sale of patent rights to the purchase of propanil, an unpatented and unpatentable article, and because it refused to grant licenses to other propanil producers. The District Court granted summary judgment for petitioners on the ground that respondent was barred from obtaining relief against infringers be-

cause it had attempted illegally to extend its patent monopoly. The court ruled that the language of § 271 (d) specifying conduct that is deemed not to be patent abuse did not encompass the totality of respondent's conduct. The Court of Appeals reversed, holding that, by specifying in § 271 (d) conduct that is not to be deemed patent misuse, Congress conferred upon a patentee the right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention, and that since respondent's conduct was designed to accomplish only what the statute contemplated, petitioners' misuse defense was of no avail.

Held: Respondent has not engaged in patent misuse, either by its method of selling propanil, or by its refusal to license others to sell that commodity. Pp. 187–223.

(a) Viewed against the backdrop of judicial precedent involving the doctrines of contributory infringement and patent misuse, the language and structure of § 271 support respondent's contention that, because § 271 (d) immunizes its conduct from the charge of patent misuse, it should not be barred from seeking relief against contributory infringement. Section 271 (c) identifies the basic dividing line between contributory infringement and patent misuse and adopts a restrictive definition of contributory infringement that distinguishes between staple and nonstaple articles of commerce. Section 271 (c)'s limitations on contributory infringement are counterbalanced by the limitations on patent misuse in § 271 (d), which effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods. Respondent's conduct is not dissimilar in either nature or effect from the three species of conduct that are expressly excluded by § 271 (d) from characterization as misuse. It sells propanil, authorizes others to use it, and sues contributory infringers, all protected activities. While respondent does not license others to sell propanil, nothing on the face of the statute requires it to do so. And, although respondent's linkage of two protected activities—sale of propanil and authorization to practice the patented process—together in a single transaction is not expressly covered by § 271 (d), petitioners have failed to identify any way in which such "tying" of two expressly protected activities results in any extension of control over unpatented materials beyond what § 271 (d) already allows. Pp. 200–202.

(b) The relevant legislative materials, especially the extensive congressional hearings that led up to the final enactment of § 271 in 1952, reinforce the conclusion that § 271 (d) was designed to immunize from the charge of patent misuse behavior similar to that in which respondent has

engaged, and that, by enacting §§ 271 (c) and (d), Congress granted to patent holders a statutory right to control nonstaple goods that are capable only of infringing use in a patented invention and are essential to that invention's advance over prior art. There is nothing in the legislative history to show that respondent's behavior falls outside § 271 (d)'s scope. Pp. 202–215.

(c) The above interpretation of § 271 (d) is not foreclosed by decisions in this Court following passage of the 1952 Patent Act. Contrary to petitioners' assertion, this Court in those decisions did not continue to apply the holdings of *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680—that even an attempt to control the market for unpatented goods having no use outside a patented invention would constitute patent misuse—and did not effectively construe § 271 (d) to codify the result of the *Mercoid* decisions. The staple-nonstaple distinction supplies the controlling benchmark and ensures that the patentee's right to prevent others from contributorily infringing his patent affects only the market for the invention itself. *Aro Mfg. Co.* v. *Convertible Top Co.*, 365 U. S. 336, and *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476, distinguished. Pp. 215–220.

599 F. 2d 685, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 223. STEVENS, J., filed a dissenting opinion, *post*, p. 240.

Ned L. Conley argued the cause and filed briefs for petitioners.

Rudolf E. Hutz argued the cause for respondent. With him on the brief were *Arthur G. Connolly, Januar D. Bove, Jr., James M. Mulligan, George W. F. Simmons, William E. Lambert III*, and *J. Fay Hall, Jr.*

Eugene L. Bernard argued the cause for the National Agricultural Chemicals Association as *amicus curiae* urging affirmance. With him on the brief were *Frank L. Neuhauser, William K. Wells, Jr.*, and *John D. Conner.**

*Solicitor General McCree, Assistant Attorney General Litvack, Deputy Solicitor General Wallace, Robert B. Nicholson, Robert V. Allen, Roger

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an important question of statutory interpretation arising under the patent laws. The issue before us is whether the owner of a patent on a chemical process is guilty of patent misuse, and therefore is barred from seeking relief against contributory infringement of its patent rights, if it exploits the patent only in conjunction with the sale of an unpatented article that constitutes a material part of the invention and is not suited for commercial use outside the scope of the patent claims. The answer will determine whether respondent, the owner of a process patent on a chemical herbicide, may maintain an action for contributory infringement against other manufacturers of the chemical used in the process. To resolve this issue, we must construe the various provisions of 35 U. S. C. § 271, which Congress enacted in 1952 to codify certain aspects of the doctrines of contributory infringement and patent misuse that previously had been developed by the judiciary.

I

The doctrines of contributory infringement and patent misuse have long and interrelated histories. The idea that a patentee should be able to obtain relief against those whose

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B. Andewelt, and *Frederic Freilicher* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William J. Butler, Jr.*, and *Frank M. Northam* for the American Chemical Society; by *John H. Pickering, Donald F. Turner, Robert A. Hammond III*, and *A. Stephen Hut, Jr.*, for the Chemical Manufacturers Association; by *Paul B. Bell, C. Lee Cook, Jr., James H. Marsh, Jr.*, and *Roger W. Parkhurst* for the Licensing Executives Society (U. S. A.), Inc.; by *Robert H. Morse* and *Thomas J. Houser* for the National Association of Manufacturers; by *Eric P. Schellin* for the National Small Business Association; by *Barry D. Rein, Stanley H. Lieberstein*, and *Kenneth E. Madsen* for the New York Patent Law Association; by *Philip Elman, Joel E. Hoffman*, and *William R. Weissman* for the Pharmaceutical Manufacturers Association; and by *Timothy L. Tilton* and *Howard W. Bremer* for the Society of University Patent Administrators et al.

acts facilitate infringement by others has been part of our law since *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871). The idea that a patentee should be denied relief against infringers if he has attempted illegally to extend the scope of his patent monopoly is of somewhat more recent origin, but it goes back at least as far as *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917). The two concepts, contributory infringement and patent misuse, often are juxtaposed, because both concern the relationship between a patented invention and unpatented articles or elements that are needed for the invention to be practiced.

Both doctrines originally were developed by the courts. But in its 1952 codification of the patent laws Congress endeavored, at least in part, to substitute statutory precepts for the general judicial rules that had governed prior to that time. Its efforts find expression in 35 U. S. C. § 271:

> "(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.
>
> "(b) Whoever actively induces infringement of a patent shall be liable as an infringer.
>
> "(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.
>
> "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having

> done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

Of particular import to the present controversy are subsections (c) and (d). The former defines conduct that constitutes contributory infringement; the latter specifies conduct of the patentee that is *not* to be deemed misuse.

A

The catalyst for this litigation is a chemical compound known to scientists as "3, 4-dichloropropionanilide" and referred to in the chemical industry as "propanil." In the late 1950's, it was discovered that this compound had properties that made it useful as a selective, "post-emergence" herbicide particularly well suited for the cultivation of rice. If applied in the proper quantities, propanil kills weeds normally found in rice crops without adversely affecting the crops themselves. It thus permits spraying of general areas where the crops are already growing, and eliminates the necessity for hand weeding or flooding of the rice fields. Propanil is one of several herbicides that are commercially available for use in rice cultivation.

Efforts to obtain patent rights to propanil or its use as a herbicide have been continuous since the herbicidal qualities of the chemical first came to light. The initial contender for a patent monopoly for this chemical compound was the Monsanto Company. In 1957, Monsanto filed the first of three successive applications for a patent on propanil itself. After lengthy proceedings in the United States Patent Office, a patent, No. 3,382,280, finally was issued in 1968. It was de-

cleared invalid, however, when Monsanto sought to enforce it by suing Rohm and Haas Company (Rohm & Haas), a competing manufacturer, for direct infringement. *Monsanto Co.* v. *Rohm & Haas Co.*, 312 F. Supp. 778 (ED Pa. 1970), aff'd, 456 F. 2d 592 (CA3), cert. denied, 407 U. S. 934 (1972). The District Court held that propanil had been implicitly revealed in prior art dating as far back as 1902, even though its use as a herbicide had been discovered only recently. 312 F. Supp., at 787–790. Monsanto subsequently dedicated the patent to the public, and it is not a party to the present suit.

Invalidation of the Monsanto patent cleared the way for Rohm & Haas, respondent here, to obtain a patent on the method or process for applying propanil. This is the patent on which the present lawsuit is founded. Rohm & Haas' efforts to obtain a propanil patent began in 1958. These efforts finally bore fruit when, on June 11, 1974, the United States Patent Office issued Patent No. 3,816,092 (the Wilson patent) to Harold F. Wilson and Dougal H. McRay.[1] The patent contains several claims covering a method for applying propanil to inhibit the growth of undesirable plants in areas containing established crops.[2] Rohm & Haas has been the sole owner of the patent since its issuance.

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[1] The patent was issued to Rohm & Haas as the result of an interference proceeding in the United States Patent Office between Rohm & Haas and Monsanto. In that proceeding the Patent Office decided that Wilson, and not the applicant for the Monsanto patent (Huffman), was actually the first to invent the process for using propanil as a herbicide.

[2] The Wilson patent contains several claims relevant to this proceeding. Of these the following are illustrative:

1. "A method for selectively inhibiting growth of undesirable plants in an area containing growing undesirable plants in an established crop, which comprises applying to said area 3, 4-dichloropropionanilide at a rate of application which inhibits growth of said undesirable plants and which does not adversely affect the growth of said established crop."

2. "The method according to claim 1 wherein the 3, 4-dichloropropionanilide is applied in a composition comprising 3, 4-dichloropropionanilide and an inert diluent therefor at a rate of between 0.5 and 6 pounds of

Petitioners, too, are chemical manufacturers. They have manufactured and sold propanil for application to rice crops since before Rohm & Haas received its patent. They market the chemical in containers on which are printed directions for application in accordance with the method claimed in the Wilson patent. Petitioners did not cease manufacture and sale of propanil after that patent issued, despite knowledge that farmers purchasing their products would infringe on the patented method by applying the propanil to their crops. Accordingly, Rohm & Haas filed this suit, in the United States District Court for the Southern District of Texas, seeking injunctive relief against petitioners on the ground that their manufacture and sale of propanil interfered with its patent rights.

The complaint alleged not only that petitioners contributed to infringement by farmers who purchased and used petitioners' propanil, but also that they actually induced such infringement by instructing farmers how to apply the herbicide. See 35 U. S. C. §§ 271 (b) and (c). Petitioners responded to the suit by requesting licenses to practice the patented method. When Rohm & Haas refused to grant such licenses, however, petitioners raised a defense of patent misuse and counterclaimed for alleged antitrust violations by respondent. The parties entered into a stipulation of facts, and petitioners moved for partial summary judgment. They argued that Rohm & Haas has misused its patent by conveying the right to practice the patented method only to purchasers of its own propanil.

The District Court granted summary judgment for petitioners. 191 USPQ 691 (1976). It agreed that Rohm & Haas was barred from obtaining relief against infringers of its patent because it had attempted illegally to extend its patent monopoly. The District Court recognized that 35 U. S. C.

3, 4-dichloropropionanilide per acre." 191 USPQ 691, 695 (SD Tex. 1976).

§ 271 (d) specifies certain conduct which is not to be deemed patent misuse. The court ruled, however, that "[t]he language of § 271 (d) simply does not encompass the totality of [Rohm & Haas'] conduct in this case." 191 USPQ, at 704. It held that respondent's refusal to grant licenses, other than the "implied" licenses conferred by operation of law upon purchasers of its propanil, constituted an attempt by means of a "tying" arrangement to effect a monopoly over an unpatented component of the process. The District Court concluded that this conduct would be deemed patent misuse under the judicial decisions that preceded § 271 (d), and it held that "[n]either the legislative history nor the language of § 271 indicates that this rule has been modified." 191 USPQ, at 707.[3]

The United States Court of Appeals for the Fifth Circuit reversed. 599 F. 2d 685 (1979). It emphasized the fact that propanil, in the terminology of the patent law, is a "nonstaple" article, that is, one that has no commercial use except in connection with respondent's patented invention. After a thorough review of the judicial developments preceding enactment of § 271, and a detailed examination of the legislative history of that provision, the court concluded that the legislation restored to the patentee protection against contributory infringement that decisions of this Court theretofore had undermined. To secure that result, Congress found it necessary to cut back on the doctrine of patent misuse. The Court of Appeals determined that, by specifying in § 271 (d) conduct that is not to be deemed misuse, "Congress

[3] The District Court limited its ruling on the motion for partial summary judgment to the question of patent misuse. It admonished that "[n]othing in this ruling should be construed to be determinative" of petitioners' antitrust counterclaims. 191 USPQ, at 707. These counterclaims are based, *inter alia*, on allegations that Rohm & Haas engaged in coercive marketing practices prior to issuance of the Wilson patent. These charges are not implicated in this appeal, and they remain for development on remand.

did clearly provide for a patentee's right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention." 599 F. 2d, at 704 (emphasis in original). Since Rohm & Haas' conduct was designed to accomplish only what the statute contemplated, the court ruled that petitioners' misuse defense was of no avail.

We granted certiorari, 444 U. S. 1012 (1980), to forestall a possible conflict in the lower courts[4] and to resolve an issue of prime importance in the administration of the patent law.

B

For present purposes certain material facts are not in dispute. First, the validity of the Wilson patent is not in question at this stage in the litigation.[5] We therefore must assume that respondent is the lawful owner of the sole and exclusive right to use, or to license others to use, propanil as a herbicide on rice fields in accordance with the methods claimed in the Wilson patent. Second, petitioners do not dispute that their manufacture and sale of propanil together with instructions for use as a herbicide constitute contributory infringement of the Rohm & Haas patent. Tr. of Oral Arg. 14. Accordingly, they admit that propanil constitutes "a material part of [respondent's] invention," that it is "espe-

[4] There is no direct conflict, but a number of decisions exhibit some tension on questions of patent misuse and the scope of 35 U. S. C. § 271 (d). Cf., *e. g., Ansul Co.* v. *Uniroyal, Inc.*, 306 F. Supp. 541, 562 (SDNY 1969), aff'd in part and rev'd in part, 448 F. 2d 872 (CA2 1971), cert. denied *sub nom. Uniroyal, Inc.* v. *Louisville Chemical Co.*, 404 U. S. 1018 (1972); *Rohm & Haas Co.* v. *Roberts Chemicals, Inc.*, 245 F. 2d 693, 699 (CA4 1957); *Harte & Co.* v. *L. E. Carpenter & Co.*, 138 USPQ 578, 584 (SDNY 1963); *Sola Electric Co.* v. *General Electric Co.*, 146 F. Supp. 625, 647–648 (ND Ill. 1956). See also Nelson, Mercoid-Type Misuse is Alive, 56 J. Pat. Off. Soc. 134 (1974).

[5] In their answers to the complaint, petitioners asserted the invalidity of Rohm & Haas' patent on a variety of grounds. See 599 F. 2d 685, 687 (1979). These contentions have not yet been addressed or decided by either the District Court or the Court of Appeals.

cially made or especially adapted for use in an infringement of [the] patent," and that it is "not a staple article or commodity of commerce suitable for substantial noninfringing use," all within the language of 35 U. S. C. § 271 (c).[6] They also concede that they have produced and sold propanil with knowledge that it would be used in a manner infringing on respondent's patent rights. To put the same matter in slightly different terms, as the litigation now stands, petitioners admit commission of a tort and raise as their only defense to liability the contention that respondent, by engaging in patent misuse, comes into court with unclean hands.[7]

As a result of these concessions, our chief focus of inquiry must be the scope of the doctrine of patent misuse in light of the limitations placed upon that doctrine by § 271 (d). On this subject, as well, our task is guided by certain stipulations and concessions. The parties agree that Rohm & Haas makes and sells propanil; that it has refused to license petitioners or any others to do the same; that it has not granted express licenses either to retailers or to end users of the product; and that farmers who buy propanil from Rohm & Haas may use it, without fear of being sued for direct infringement, by virtue of an "implied license" they obtain when Rohm & Haas relinquishes its monopoly by selling the propanil. See App. 35–39. See also *United States* v. *Univis Lens Co.*, 316 U. S. 241, 249 (1942); cf. *Adams* v. *Burke*, 17 Wall. 453 (1873). The parties further agree that §§ 271 (d)(1) and (3) permit respondent both to sell propanil itself and to sue

[6] We follow the practice of the Court of Appeals and the parties by using the term "nonstaple" throughout this opinion to refer to a component as defined in 35 U. S. C. § 271 (c), the unlicensed sale of which would constitute contributory infringement. A "staple" component is one that does not fit this definition. We recognize that the terms "staple" and "nonstaple" have not always been defined precisely in this fashion.

[7] See *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (CA6 1897) (contributory infringement a tort); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492–494 (1942) (patent misuse linked to equitable doctrine of "unclean hands").

others who sell the same product without a license, and that under § 271 (d)(2) it would be free to demand royalties from others for the sale of propanil if it chose to do so.

The parties disagree over whether respondent has engaged in any additional conduct that amounts to patent misuse. Petitioners assert that there has been misuse because respondent has "tied" the sale of patent rights to the purchase of propanil, an unpatented and indeed unpatentable article, and because it has refused to grant licenses to other producers of the chemical compound. They argue that § 271 (d) does not permit any sort of tying arrangement, and that resort to such a practice excludes respondent from the category of patentees "otherwise entitled to relief" within the meaning of § 271 (d). Rohm & Haas, understandably, vigorously resists this characterization of its conduct. It argues that its acts have been only those that § 271 (d), by express mandate, excepts from characterization as patent misuse. It further asserts that if this conduct results in an extension of the patent right to a control over an unpatented commodity, in this instance the extension has been given express statutory sanction.

II

Our mode of analysis follows closely the trail blazed by the District Court and the Court of Appeals. It is axiomatic, of course, that statutory construction must begin with the language of the statute itself. But the language of § 271 is generic and freighted with a meaning derived from the decisional history that preceded it. The Court of Appeals appropriately observed that more than one interpretation of the statutory language has a surface plausibility. To place § 271 in proper perspective, therefore, we believe that it is helpful first to review in detail the doctrines of contributory infringement and patent misuse as they had developed prior to Congress' attempt to codify the governing principles.

As we have noted, the doctrine of contributory infringe-

ment had its genesis in an era of simpler and less subtle technology. Its basic elements are perhaps best explained with a classic example drawn from that era. In *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871), the patentee had invented a new burner for an oil lamp. In compliance with the technical rules of patent claiming, this invention was patented in a combination that also included the standard fuel reservoir, wick tube, and chimney necessary for a properly functioning lamp. After the patent issued, a competitor began to market a rival product including the novel burner but not the chimney. *Id.*, at 79. Under the sometimes scholastic law of patents, this conduct did not amount to direct infringement, because the competitor had not replicated every single element of the patentee's claimed combination. Cf., *e. g.*, *Prouty* v. *Ruggles*, 16 Pet. 336, 341 (1842). Yet the court held that there had been "palpable interference" with the patentee's legal rights, because purchasers would be certain to complete the combination, and hence the infringement, by adding the glass chimney. 29 F. Cas., at 80. The court permitted the patentee to enforce his rights against the competitor who brought about the infringement, rather than requiring the patentee to undertake the almost insuperable task of finding and suing all the innocent purchasers who technically were responsible for completing the infringement. *Ibid.* See also *Bowker* v. *Dows*, 3 F. Cas. 1070 (No. 1,734) (CC Mass. 1878).

The *Wallace* case demonstrates, in a readily comprehensible setting, the reason for the contributory infringement doctrine. It exists to protect patent rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others. This protection is of particular importance in situations, like the oil lamp case itself, where enforcement against direct infringers would be difficult, and where the technicalities of patent law make it relatively easy to profit from another's invention without risking a charge of direct infringement.

See *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (CA6 1897) (Taft, Circuit Judge); Miller, Some Views on the Law of Patent Infringement by Inducement, 53 J. Pat. Off. Soc. 86, 87–94 (1971).

Although the propriety of the decision in *Wallace* v. *Holmes* seldom has been challenged, the contributory infringement doctrine it spawned has not always enjoyed full adherence in other contexts. The difficulty that the doctrine has encountered stems not so much from rejection of its core concept as from a desire to delimit its outer contours. In time, concern for potential anticompetitive tendencies inherent in actions for contributory infringement led to retrenchment on the doctrine. The judicial history of contributory infringement thus may be said to be marked by a period of ascendancy, in which the doctrine was expanded to the point where it became subject to abuse, followed by a somewhat longer period of decline, in which the concept of patent misuse was developed as an increasingly stringent antidote to the perceived excesses of the earlier period.

The doctrine of contributory infringement was first addressed by this Court in *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425 (1894). That case was a suit by a manufacturer of a patented device for dispensing toilet paper against a supplier of paper rolls that fit the patented invention. The Court accepted the contributory infringement doctrine in theory but held that it could not be invoked against a supplier of perishable commodities used in a patented invention. The Court observed that a contrary outcome would give the patentee "the benefit of a patent" on ordinary articles of commerce, a result that it determined to be unjustified on the facts of that case. *Id.*, at 433.

Despite this wary reception, contributory infringement actions continued to flourish in the lower courts.[8] Eventually

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[8] See, *e. g.*, *Thomson-Houston Electric Co.* v. *Kelsey Electric R. Specialty Co.*, 72 F. 1016 (CC Conn. 1896); *American Graphophone Co.* v.

the doctrine gained more wholehearted acceptance here. In *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909), the Court upheld an injunction against contributory infringement by a manufacturer of phonograph discs specially designed for use in a patented disc-and-stylus combination. Although the disc itself was not patented, the Court noted that it was essential to the functioning of the patented combination, and that its method of interaction with the stylus was what "mark[ed] the advance upon the prior art." *Id.*, at 330. It also stressed that the disc was capable of use only in the patented combination, there being no other commercially available stylus with which it would operate. The Court distinguished the result in *Morgan Envelope* on the broad grounds that "[n]ot one of the determining factors there stated exists in the case at bar," and it held that the attempt to link the two cases "is not only to confound essential distinctions made by the patent laws, but essential distinctions between entirely different things." 213 U. S., at 335.

The contributory infringement doctrine achieved its high-water mark with the decision in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912). In that case a divided Court extended contributory infringement principles to permit a conditional licensing arrangement whereby a manufacturer of a patented printing machine could require purchasers to obtain all supplies used in connection with the invention, including such staple items as paper and ink, exclusively from the patentee. The Court reasoned that the market for these supplies was created by the invention, and that sale of a license to use the

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Amet, 74 F. 789 (CC ND Ill. 1896); *Thomson-Houston Electric Co.* v. *Ohio Brass Co., supra; Red Jacket Mfg. Co.* v. *Davis*, 82 F. 432, 439 (CA7 1897); *American Graphophone Co.* v. *Leeds*, 87 F. 873 (CC SDNY 1898); *Wilkins Shoe-Button Fastener Co.* v. *Webb*, 89 F. 982, 996 (CC ND Ohio 1898); *Canda* v. *Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *James Heekin Co.* v. *Baker*, 138 F. 63, 66 (CA8 1905) (Van Devanter, Circuit Judge).

patented product, like sale of other species of property, could be limited by whatever conditions the property owner wished to impose. *Id.*, at 31–32. The *A. B. Dick* decision and its progeny in the lower courts led to a vast expansion in conditional licensing of patented goods and processes used to control markets for staple and nonstaple goods alike.[9]

This was followed by what may be characterized through the lens of hindsight as an inevitable judicial reaction. In *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917), the Court signalled a new trend that was to continue for years thereafter.[10] The owner of a patent on projection equipment attempted to prevent competitors from selling film for use in the patented equipment by attaching to the projectors it sold a notice purporting to condition use of the machine on exclusive use of its film. The film previously had been patented but that patent had expired. The Court addressed the broad issue whether a patentee possessed the right to condition sale of a patented machine on the purchase of articles "which are no part of the patented machine, and which are not patented." *Id.*, at 508. Relying upon the rule that the scope of a patent "must be limited to the invention described in the claims," *id.*, at 511, the Court held that the attempted restriction on use of unpatented supplies was improper:

> "Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular char-

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[9] See F. Vaughan, Economics of Our Patent System 253–254 (1925) (collecting cases).

[10] In addition to this judicial reaction, there was legislative reaction as well. In 1914, partly in response to the decision in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), Congress enacted § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14. See *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137–138 (1936).

> acter of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it." *Id.*, at 518.

By this reasoning, the Court focused on the conduct of the patentee, not that of the alleged infringer. It noted that as a result of lower court decisions, conditional licensing arrangements had greatly increased, indeed, to the point where they threatened to become "perfect instrument[s] of favoritism and oppression." *Id.*, at 515. The Court warned that approval of the licensing scheme under consideration would enable the patentee to "ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business." *Ibid.* This ruling was directly in conflict with *Henry* v. *A. B. Dick Co.*, *supra*, and the Court expressly observed that that decision "must be regarded as overruled." 243 U. S., at 518.

The broad ramifications of the *Motion Picture* case apparently were not immediately comprehended, and in a series of decisions over the next three decades litigants tested its limits. In *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931), the Court denied relief to a patentee who, through its sole licensee, authorized use of a patented design for a refrigeration package only to purchasers from the licensee of solid carbon dioxide ("dry ice"), a refrigerant that the licensee manufactured.[11] The refrigerant was a well-known and widely used staple article of commerce, and the patent in question claimed neither a machine for making it nor a process for using it. *Id.*, at 29. The Court held that the patent holder and its licensee were attempting to exclude

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[11] In a subsequent decision rendered during the same Term, the Court held that the patent itself was invalid because the claimed package had been anticipated by prior art. *Carbice Corp.* v. *American Patents Co.*, 283 U. S. 420 (1931).

competitors in the refrigerant business from a portion of the market, and that this conduct constituted patent misuse. It reasoned:

> "Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used. Relief is denied because the [licensee] is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention." *Id.*, at 33–34.

The Court also rejected the patentee's reliance on the *Leeds & Catlin* decision. It found "no suggestion" in that case that the owner of the disc-stylus combination patent had attempted to derive profits from the sale of unpatented supplies as opposed to a patented invention. 283 U. S., at 34.

Other decisions of a similar import followed. *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), found patent misuse in an attempt to exploit a process patent for the curing of cement through the sale of bituminous emulsion, an unpatented staple article of commerce used in the process. The Court eschewed an attempt to limit the rule of *Carbice* and *Motion Picture* to cases involving explicit agreements extending the patent monopoly, and it stated the broad proposition that "every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited." 302 U. S., at 463. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492–494 (1942), which involved an attempt to control the market for salt tablets used in a patented dispenser, explicitly linked the doctrine of patent misuse to the "unclean hands" doctrine traditionally applied by courts of equity. Its companion case, *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 495–498 (1942), held that patent misuse barred relief even where infringement had been actively induced, and that practical

difficulties in marketing a patented invention could not justify patent misuse.[12]

Although none of these decisions purported to cut back on the doctrine of contributory infringement itself, they were generally perceived as having that effect, and how far the developing doctrine of patent misuse might extend was a topic of some speculation among members of the patent bar.

[12] This case arguably involved an application of the misuse doctrine to an attempt to control a nonstaple material. It arose from a suit for infringement of a process patent claiming a method for reinforcing insoles used in shoes. The patentee marketed its patented process in connection with sale of canvas duck that had been precoated with adhesive for use in the patented process. It claimed that suppliers of a rival adhesive-coated duck fabric, suitable for use in the patented method, had both contributed to and induced infringement of the patent. The Court of Appeals found patent misuse. It rejected, *inter alia*, the patentee's contention that *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931), and *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), were inapplicable because the adhesive-coated duck was a nonstaple article. *B. B. Chemical Co.* v. *Ellis*, 117 F. 2d 829, 834–835 (CA1 1941). The question whether the allegedly nonstaple nature of the item affected the applicability of the *Carbice* and *Leitch* standards was presented to this Court on certiorari. See Pet. for Cert. in *B. B. Chemical Co.* v. *Ellis*, O. T. 1941, No. 75, p. 10. In the petitioner's brief on the merits, however, the nonstaple character of the item was not pressed as a ground for legal distinction, and respondents argued that the material was not a nonstaple. See Brief for Petitioner, O. T. 1941, No. 75, p. 20; Brief for Respondents, O. T. 1941, No. 75, pp. 11–13. The Court did not mention this question in its brief opinion. In contrast to the dissent, *post*, at 227–229, we decline in the absence of any articulated reasoning to speculate whether the Court accepted the respondents' view that only a staple commodity was involved, adopted some other position, or, as the failure to discuss *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909), might suggest, simply chose not to address a matter that had not been fully presented. We also disagree with the dissent's attempt, *post*, at 229, n. 3, to equate the unconditional licenses belatedly proposed by the patentee in *B. B. Chemical* with the licensing scheme practiced in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944). See *infra*, at 195–197.

The Court's decisions had not yet addressed the status of contributory infringement or patent misuse with respect to nonstaple goods, and some courts and commentators apparently took the view that control of nonstaple items capable only of infringing use might not bar patent protection against contributory infringement.[13] This view soon received a serious, if not fatal, blow from the Court's controversial decisions in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (*Mercoid I*), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) (*Mercoid II*). In these cases, the Court definitely held that any attempt to control the market for unpatented goods would constitute patent misuse, even if those goods had no use outside a patented invention. Because these cases served as the point of departure for congressional legislation, they merit more than passing citation.

Both cases involved a single patent that claimed a combination of elements for a furnace heating system. Mid-Continent was the owner of the patent, and Honeywell was its licensee. Although neither company made or installed the furnace system, Honeywell manufactured and sold stoker switches especially made for and essential to the system's operation. The right to build and use the system was granted to purchasers of the stoker switches, and royalties owed the patentee were calculated on the number of stoker switches sold. Mercoid manufactured and marketed a competing stoker switch that was designed to be used only in the patented combination. Mercoid had been offered a sublicense

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[13] See, *e. g.*, *J. C. Ferguson Mfg. Works* v. *American Lecithin Co.*, 94 F. 2d 729, 731 (CA1), cert. denied, 304 U. S. 573 (1938); *Johnson Co.* v. *Philad Co.*, 96 F. 2d 442, 446–447 (CA9 1938); but see *Philad Co.* v. *Lechler Laboratories, Inc.*, 107 F. 2d 747, 748 (CA2 1939). See also Diamond, The Status of Combination Patents Owned by Sellers of an Element of the Combination, 21 J. Pat. Off. Soc. 843, 849–850 (1939); Thomas, The Law of Contributory Infringement, 21 J. Pat. Off. Soc. 811, 835, 842 (1939).

by the licensee but had refused to take one. It was sued for contributory infringement by both the patentee and the licensee, and it raised patent misuse as a defense.

In *Mercoid I* the Court barred the patentee from obtaining relief because it deemed the licensing arrangement with Honeywell to be an unlawful attempt to extend the patent monopoly. The opinion for the Court painted with a very broad brush. Prior patent misuse decisions had involved attempts "to secure a partial monopoly in supplies consumed . . . or unpatented materials employed" in connection with the practice of the invention. None, however, had involved an integral component necessary to the functioning of the patented system. 320 U. S., at 665. The Court refused, however, to infer any "difference in principle" from this distinction in fact. *Ibid.* Instead, it stated an expansive rule that apparently admitted no exception:

> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. . . . The method by which the monopoly is sought to be extended is immaterial. . . . When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts. The contract is not saved by anything in the patent laws because it relates to the invention. If it were, the mere act of the patentee could make the distinctive claim of the patent attach to something which does not possess the quality of invention. Then the patent would be diverted from its statutory purpose and become a ready instrument for economic control in domains where the

> anti-trust acts or other laws not the patent statutes define the public policy." *Id.*, at 666.

The Court recognized that its reasoning directly conflicted with *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, *supra*, and it registered disapproval, if not outright rejection, of that case. 320 U. S., at 668. It also recognized that "[t]he result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement." *Id.*, at 669. The Court commented, rather cryptically, that it would not "stop to consider" what "residuum" of the contributory infringement doctrine "may be left." *Ibid.*

Mercoid II did not add much to the breathtaking sweep of its companion decision. The Court did reinforce, however, the conclusion that its ruling made no exception for elements essential to the inventive character of a patented combination. "However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device." 320 U. S., at 684.

What emerges from this review of judicial development is a fairly complicated picture, in which the rights and obligations of patentees as against contributory infringers have varied over time. We need not decide how respondent would have fared against a charge of patent misuse at any particular point prior to the enactment of 35 U. S. C. § 271. Nevertheless, certain inferences that are pertinent to the present inquiry may be drawn from these historical developments.

First, we agree with the Court of Appeals that the concepts of contributory infringement and patent misuse "rest on antithetical underpinnings." 599 F. 2d, at 697. The traditional remedy against contributory infringement is the injunction. And an inevitable concomitant of the right to enjoin another from contributory infringement is the capacity to suppress competition in an unpatented article of commerce. See, *e. g.*,

Thomson-Houston Electric Co. v. *Kelsey Electric R. Specialty Co.*, 72 F. 1016, 1018–1019 (CC Conn. 1896). Proponents of contributory infringement defend this result on the grounds that it is necessary for the protection of the patent right, and that the market for the unpatented article flows from the patentee's invention. They also observe that in many instances the article is "unpatented" only because of the technical rules of patent claiming, which require the placement of an invention in its context. Yet suppression of competition in unpatented goods is precisely what the opponents of patent misuse decry.[14] If both the patent misuse and contributory infringement doctrines are to coexist, then, each must have some separate sphere of operation with which the other does not interfere.

Second, we find that the majority of cases in which the patent misuse doctrine was developed involved undoing the damage thought to have been done by *A. B. Dick*. The desire to extend patent protection to control of staple articles of commerce died slowly, and the ghost of the expansive contributory infringement era continued to haunt the courts. As a result, among the historical precedents in this Court, only the *Leeds & Catlin* and *Mercoid* cases bear significant factual similarity to the present controversy. Those cases involved questions of control over unpatented articles that were essential to the patented inventions, and that were unsuited for any commercial noninfringing use. In this case, we face similar questions in connection with a chemical, pro-

[14] Even in the classic contributory infringement case of *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871), the patentee's effort to control the market for the novel burner that embodied his invention arguably constituted patent misuse. If the patentee were permitted to prevent competitors from making and selling that element, the argument would run, he would have the power to erect a monopoly over the production and sale of the burner, an unpatented element, even though his patent right was limited to control over use of the burner in the claimed combination.

panil, the herbicidal properties of which are essential to the advance on prior art disclosed by respondent's patented process. Like the record disc in *Leeds & Catlin* or the stoker switch in the *Mercoid* cases, and unlike the dry ice in *Carbice* or the bituminous emulsion in *Leitch*, propanil is a nonstaple commodity which has no use except through practice of the patented method. Accordingly, had the present case arisen prior to *Mercoid*, we believe it fair to say that it would have fallen close to the wavering line between legitimate protection against contributory infringement and illegitimate patent misuse.

III

The *Mercoid* decisions left in their wake some consternation among patent lawyers [15] and a degree of confusion in the lower courts. Although some courts treated the *Mercoid* pronouncements as limited in effect to the specific kind of licensing arrangement at issue in those cases, others took a much more expansive view of the decision.[16] Among the

[15] See, *e. g.*, Mathews, Contributory Infringement and the Mercoid Case, 27 J. Pat. Off. Soc. 260 (1945); Wiles, Joint Trespasses on Patent Property, 30 A. B. A. J. 454 (1944); Wood, The Tangle of Mercoid Case Implications, 13 Geo. Wash. L. Rev. 61 (1944); Comment, 42 Mich. L. Rev. 915 (1944).

[16] Compare, *e. g.*, *Harris* v. *National Machine Works, Inc.*, 171 F. 2d 85, 89–90 (CA10 1948), cert. denied, 336 U. S. 905 (1949); *Florence-Mayo Nuway Co.* v. *Hardy*, 168 F. 2d 778, 785 (CA4 1948); *Aeration Processes, Inc.* v. *Walter Kidde & Co.*, 77 F. Supp. 647, 654 (WDNY 1948); *Detroit Lubricator Co.* v. *Toussaint*, 57 F. Supp. 837, 838 (ND Ill. 1944); and *Hall* v. *Montgomery Ward & Co.*, 57 F. Supp. 430, 437–438 (ND W. Va. 1944), with *Galion Metallic Vault Co.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 72, 75–76 (CA3), cert. denied, 335 U. S. 859 (1948); *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 61 F. Supp. 767, 769 (Del. 1945), aff'd, 156 F. 2d 981 (CA3), cert. denied, 329 U. S. 781 (1946); *Landis Machinery Co.* v. *Chaso Tool Co.*, 141 F. 2d 800, 801 (CA6), cert. denied, 323 U. S. 720 (1944); *Master Metal Strip Service, Inc.* v. *Protex Weatherstrip Mfg. Co.*, 75 USPQ 32, 34–35 (ND Ill. 1947); and *Stroco Products, Inc.* v. *Mullenbach*, 67 USPQ 168, 170 (SD Cal. 1944).

latter group, some courts held that even the filing of an action for contributory infringement, by threatening to deter competition in unpatented materials, could supply evidence of patent misuse. See, *e. g., Stroco Products, Inc.* v. *Mullenbach*, 67 USPQ 168, 170 (SD Cal. 1944). This state of affairs made it difficult for patent lawyers to advise their clients on questions of contributory infringement and to render secure opinions on the validity of proposed licensing arrangements. Certain segments of the patent bar eventually decided to ask Congress for corrective legislation that would restore some scope to the contributory infringement doctrine. With great perseverance, they advanced their proposal in three successive Congresses before it eventually was enacted in 1952 as 35 U. S. C. § 271.

A

The critical inquiry in this case is how the enactment of § 271 affected the doctrines of contributory infringement and patent misuse. Viewed against the backdrop of judicial precedent, we believe that the language and structure of the statute lend significant support to Rohm & Haas' contention that, because § 271 (d) immunizes its conduct from the charge of patent misuse, it should not be barred from seeking relief. The approach that Congress took toward the codification of contributory infringement and patent misuse reveals a compromise between those two doctrines and their competing policies that permits patentees to exercise control over nonstaple articles used in their inventions.

Section 271 (c) identifies the basic dividing line between contributory infringement and patent misuse. It adopts a restrictive definition of contributory infringement that distinguishes between staple and nonstaple articles of commerce. It also defines the class of nonstaple items narrowly. In essence, this provision places materials like the dry ice of the *Carbice* case outside the scope of the contributory infringement doctrine. As a result, it is no longer necessary to resort

to the doctrine of patent misuse in order to deny patentees control over staple goods used in their inventions.

The limitations on contributory infringement written into § 271 (c) are counterbalanced by limitations on patent misuse in § 271 (d). Three species of conduct by patentees are expressly excluded from characterization as misuse. First, the patentee may "deriv[e] revenue" from acts that "would constitute contributory infringement" if "performed by another without his consent." This provision clearly signifies that a patentee may make and sell nonstaple goods used in connection with his invention. Second, the patentee may "licens[e] or authoriz[e] another to perform acts" which without such authorization would constitute contributory infringement. This provision's use in the disjunctive of the term "authoriz[e]" suggests that more than explicit licensing agreements is contemplated. Finally, the patentee may "enforce his patent rights against . . . contributory infringement." This provision plainly means that the patentee may bring suit without fear that his doing so will be regarded as an unlawful attempt to suppress competition. The statute explicitly states that a patentee may do "one or more" of these permitted acts, and it does not state that he must do any of them.

In our view, the provisions of § 271 (d) effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods. A patentee may sell a nonstaple article himself while enjoining others from marketing that same good without his authorization. By doing so, he is able to eliminate competitors and thereby to control the market for that product. Moreover, his power to demand royalties from others for the privilege of selling the nonstaple item itself implies that the patentee may control the market for the nonstaple good; otherwise, his "right" to sell licenses for the marketing of the nonstaple good would be meaningless, since no one would be willing to pay him for a superfluous authorization. See Note, 70 Yale. L. J. 649, 659 (1961).

Rohm & Haas' conduct is not dissimilar in either nature or effect from the conduct that is thus clearly embraced within § 271 (d). It sells propanil; it authorizes others to use propanil; and it sues contributory infringers. These are all protected activities. Rohm & Haas does *not* license others to sell propanil, but nothing on the face of the statute requires it to do so. To be sure, the sum effect of Rohm & Haas' actions is to suppress competition in the market for an unpatented commodity. But as we have observed, in this its conduct is no different from that which the statute expressly protects.

The one aspect of Rohm & Haas' behavior that is not expressly covered by § 271 (d) is its linkage of two protected activities—sale of propanil and authorization to practice the patented process—together in a single transaction. Petitioners vigorously argue that this linkage, which they characterize pejoratively as "tying," supplies the otherwise missing element of misuse. They fail, however, to identify any way in which this "tying" of two expressly protected activities results in any extension of control over unpatented materials beyond what § 271 (d) already allows. Nevertheless, the language of § 271 (d) does not explicitly resolve the question when linkage of this variety becomes patent misuse. In order to judge whether this method of exploiting the patent lies within or without the protection afforded by § 271 (d), we must turn to the legislative history.

B

Petitioners argue that the legislative materials indicate at most a modest purpose for § 271. Relying mainly on the Committee Reports that accompanied the "Act to Revise and Codify the Patent Laws" (1952 Act), 66 Stat. 792, of which § 271 was a part, petitioners assert that the principal purpose of Congress was to "clarify" the law of contributory infringement as it had been developed by the courts, rather than to effect any significant substantive change. They note that

the 1952 Act undertook the major task of codifying all the patent laws in a single title, and they argue that substantive changes from recodifications are not lightly to be inferred. See *United States* v. *Ryder*, 110 U. S. 729, 739–740 (1884). They further argue that, whatever the impact of § 271 in other respects, there is not the kind of "clear and certain signal from Congress" that should be required for an extension of patent privileges. See *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 531 (1972). We disagree with petitioners' assessment. In our view, the relevant legislative materials abundantly demonstrate an intent both to change the law and to expand significantly the ability of patentees to protect their rights against contributory infringement.

The 1952 Act was approved with virtually no floor debate. Only one exchange is relevant to the present inquiry. In response to a question whether the Act would effect any substantive changes, Senator McCarran, a spokesman for the legislation, commented that the Act "codif[ies] the patent laws." 98 Cong. Rec. 9323 (1952). He also submitted a statement, which explained that, although the general purpose of the Act was to clarify existing law, it also included several changes taken "[i]n view of decisions of the Supreme Court and others." *Ibid.* Perhaps because of the magnitude of the recodification effort, the Committee Reports accompanying the 1952 Act also gave relatively cursory attention to its features. Nevertheless, they did identify § 271 as one of the "major changes or innovations in the title." H. R. Rep. No. 1923, 82d Cong., 2d Sess., 5 (1952).[17] In explaining the provisions of § 271, the Reports stated that they were intended "to codify in statutory form the principles of contributory infringement and at the same time [to] eliminate . . . doubt and confusion" that had resulted from "decisions of the courts

[17] The House and Senate Committee Reports in their significant parts were identical. See S. Rep. No. 1979, 82d Cong., 2d Sess. (1952). We confine the citations in the text, therefore, to the House Report.

in recent years." *Id.*, at 9. The Reports also commented that §§ 271 (b), (c), and (d) "have as their main purpose clarification and stabilization." *Ibid.*

These materials sufficiently demonstrate that the 1952 Act did include significant substantive changes, and that § 271 was one of them.

The principal sources for edification concerning the meaning and scope of § 271, however, are the extensive hearings that were held on the legislative proposals that led up to the final enactment. In three sets of hearings over the course of four years, proponents and opponents of the legislation debated its impact and relationship with prior law. Draftsmen of the legislation contended for a restriction on the doctrine of patent misuse that would enable patentees to protect themselves against contributory infringers. Others, including representatives of the Department of Justice, vigorously opposed such a restriction.

Although the final version of the statute reflects some minor changes from earlier drafts, the essence of the legislation remained constant. References were made in the later hearings to testimony in the earlier ones.[18] Accordingly, we regard each set of hearings as relevant to a full understanding of the final legislative product. Cf., *e. g.*, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 390 (1951); *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U. S. 601, 605–606, n. 6 (1949). Together, they strongly reinforce the conclusion that § 271 (d) was designed to immunize from the charge of patent misuse behavior similar to that in which the respondent has engaged.

1. *The 1948 Hearings.* The first bill underlying § 271 was H. R. 5988, proposed to the 80th Congress. During the hearings on this bill its origin and purpose were carefully ex-

[18] See, *e. g.*, Hearings on H. R. 3760 before Subcommittee No. 3 of the House Committee on the Judiciary, 82d Cong., 1st Sess., 150–151 (1951) (1951 Hearings) (testimony of Giles Rich).

plained. The New York Patent Law Association, which had supervised drafting of the legislation, submitted a prepared memorandum that candidly declared that the purpose of the proposal was to reverse the trend of Supreme Court decisions that indirectly had cut back on the contributory infringement doctrine. Hearings on H. R. 5988, etc., before the Subcommittee on Patents, Trade-Marks, and Copyrights of the House Committee on the Judiciary, 80th Cong., 2d Sess., 4 (1948) (1948 Hearings). The memorandum explained the rationale behind contributory infringement, and it gave as one example of its proper application the protection of a patent for use of a chemical:

> "[O]ne who supplies a hitherto unused chemical to the public for use in a new method is stealing the benefit of the discovery of the property of this chemical which made the new method possible. To enjoin him from distributing the chemical for use in the new method does not prevent him from doing anything which he could do before the new property of the chemical had been discovered." *Ibid.*

It criticized several decisions, including *Leitch* and *Carbice* as well as the two *Mercoids*, on the ground that together they had effectively excluded such "new-use inventions" from the protections of the patent law. 1948 Hearings, at 4–5. It went on to explain that the proposed legislation was designed to counteract this effect by providing that "the mere use or enforcement of the right to be protected against contributory infringement . . . shall not be regarded as misuse of the patent." *Id.*, at 6. This approach, the memorandum stated, "does away with the ground on which the Supreme Court has destroyed the doctrine of contributory infringement" and "is essential to make the rights against contributory infringers which are revived by the statute practically useful and enforceable." *Ibid.*

Testimony by proponents of the bill developed the same

theme. Giles Rich, then a prominent patent lawyer, was one of the draftsmen. He highlighted the tension between the judicial doctrines of contributory infringement and patent misuse. He stated that early patent misuse decisions "seem to us now to have been just," but that "this doctrine has been carried too far—so far that it . . . has practically eliminated from the law the doctrine of contributory infringement as a useful legal doctrine." *Id.*, at 9. To illustrate this point, he contrasted the *Carbice* and *Mercoid* cases, and noted that the latter had involved an item without any noninfringing use. Because it incorporated a staple-nonstaple distinction in the definition of contributory infringement, Mr. Rich argued that the bill would "correct [the] situation" left by *Mercoid* "without giving sanction to practices such as those in the Carbice case." 1948 Hearings, at 11.

Rich's testimony was followed by that of Robert W. Byerly, another draftsman. He stressed the confusion in which the *Mercoid* decisions had left the lower courts, and the need for Congress to define the scope of protection against contributory infringement by drawing a clear line between deliberate taking of another's invention and legitimate trade in staple articles of commerce. *Id.*, at 13–16. Byerly discussed the practical difficulties some patentees would encounter if suits against direct infringers were their only option to protect against infringement. *Id.*, at 13–14. He argued that the breadth of the Court's misuse decision in *Mercoid I* could be discerned from the fact that it "overruled" *Leeds & Catlin*. 1948 Hearings, at 14. He explained the section of the bill restricting the scope of patent misuse as intended to give the patentee recourse to either or both of two options: "A man can either say, 'you cannot sell the part of my invention to somebody else to complete it,' or he can say, 'yes, you can sell the part of my invention to help others complete it provided you pay me a royalty.'" *Id.*, at 16.

The bill attracted opponents as well, some of whom de-

fended the result of the *Mercoid* decisions.[19] In addition, Roy C. Hackley, Jr., Chief of the Patent Section, Department of Justice, made an appearance on behalf of the Department. He took the position that statutory clarification of the scope of contributory infringement was desirable, but he warned Congress against using language that might "permit illegal extension of the patent monopoly." 1948 Hearings, at 69. On this ground he opposed the portion of the proposed bill that included language substantially similar to what is now § 271 (d). *Ibid.*

2. *The 1949 Hearings.* The 1948 bill did not come to a vote, but the patent bar resubmitted its proposal in 1949. Again, there were fairly extensive hearings, with debate, and again Rich led the list of favorable witnesses. He renewed his attempt to explain the legislation in terms of past decisions of this Court. The result in the *Carbice* case, he argued, was proper because the patentee had tried to interfere with the market in an old and widely used product. On the other hand, he cited the *Mercoid* cases as examples of a situation where "[t]here is no practical way to enforce that patent, except through a suit for contributory infringement against the party who makes the thing which is essentially the inventive subject matter [and] which, when put into use, creates infringement." Hearings on H. R. 3866 before Subcommittee No. 4 of the House Committee on the Judiciary, 81st Cong., 1st Sess., 11 (1949) (1949 Hearings).

To restore the doctrine of contributory infringement where it was most needed, Rich argued, it was essential to restrict *pro tanto* the judicially created doctrine of patent misuse:

> "I would like to recall that we are dealing with a problem which involves a conflict between two doctrines, contributory infringement and misuse.

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[19] See, *e. g.*, the testimony of I. E. McCabe, Chief Engineer of Mercoid Corp. 1948 Hearings, at 55–59. McCabe also testified at length in the 1949 and 1951 Hearings.

"It is crystal clear, when you have thoroughly studied this subject, that the only way you can make contributory infringement operative again as a doctrine, is to make some exceptions to the misuse doctrine and say that certain acts shall not be misuse. Then contributory infringement, which is there all the time, becomes operative again.

"Contributory infringement has been destroyed by the misuse doctrine; and to revive it you do not have to do anything with contributory infringement itself. You go back along the same road until you get to the point where you have contributory infringement working for you again." *Id.*, at 13–14.

Rich warned against going too far. He took the position that a law designed to reinstate the broad contributory infringement reasoning of *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), "would kill itself in time." 1949 Hearings, at 17. The proposed legislation, however, "stopped short of that" and "said that you can control only things like the switches in the Mercoid case, which are especially made or adapted for use in connection with such patent and which are not suitable for actual, commercial, noninfringing use." *Ibid.*

In the 1949 Hearings, the Department of Justice pressed more vigorous opposition to the contributory infringement proposal than it had in 1948. Represented by John C. Stedman, Chief, Legislation and Clearance Section, Antitrust Division, the Department argued that legislation was unnecessary because the *Mercoid* decisions were correct, because they had not produced as much confusion as the proponents of the new legislation claimed, and because the legislation would produce new interpretive problems. 1949 Hearings, at 50–56. Stedman defended the result of the *Mercoid* decisions on the ground that marketing techniques employed in those cases were indistinguishable in effect from tying schemes previously considered by the Court. He took the view that the staple-

nonstaple distinction should be irrelevant for purposes of patent misuse. "If the owner of the patent is using his patent in a way to prevent the sale of unpatented elements, then the misuse doctrine would apply." 1949 Hearings, at 54. Stedman added that the effect of the legislation would be to revive the *Leeds & Catlin* decision, a result the Department of Justice opposed. 1949 Hearings, at 59. Later in the hearings, he offered several methods of exploiting patent rights that arguably would eliminate the need for the contributory infringement doctrine, and he stated that a suit for contributory infringement could involve patent misuse, even if there were no conditional licensing of patent rights. *Id.*, at 76–77.

After Stedman's opening testimony, Rich was recalled for further questioning. Rich agreed with Stedman's assessment of the effect that the legislation would have, but argued that the Justice Department's arguments ignored the bill's limitation of contributory infringement to nonstaple articles. To clarify the effect of the statute, Rich declared:

> "[I]t is absolutely necessary, to get anywhere in the direction we are trying to go, to make some exception to the misuse doctrine because it is the conflict between the doctrine of contributory infringement and the doctrine of misuse that raises the problem." *Id.*, at 67.

He added:

> "The exception which we wish to make to the misuse doctrine would reverse the result in the Mercoid case; it would not reverse the result in the Carbice case." *Ibid.*

In response to questioning, Rich agreed that the bill would preserve both the contributory infringement and misuse doctrines as they had existed in this Court's cases prior to the *Mercoid* decisions. 1949 Hearings, at 68. He asserted that the method by which the patentee's invention was exploited in *Mercoid* was necessary given the nature of the businesses involved. 1949 Hearings, at 69. When asked whether the

proposed legislation would allow that kind of licensing activity, Rich responded with an unqualified "Yes." *Ibid.*

3. *The 1951 Hearings.* By the time the proposal for a statutory law of contributory infringement and patent misuse was presented to the 82d Congress, the battle lines of the earlier hearings had solidified substantially, and the representatives of the patent bar once again found themselves faced with the formidable opposition of the Department of Justice.

In his opening remarks before the 1951 Hearings, Rich reminded the congressional Subcommittee that, as a practical matter, it was necessary to deal with the contributory infringement and the misuse doctrines as a unit "if we are to tackle the problem at all." 1951 Hearings, at 152. He urged on the Subcommittee the need to eliminate confusion in the law left by the *Mercoid* decisions by drawing a "sensible line" between contributory infringement and patent misuse that would be "in accordance with public policy as it seems to exist today." 1951 Hearings, at 152. Rich also attempted to play down the controversiality of the proposal by arguing that a restrictive definition of contributory infringement had been incorporated into the bill. *Id.*, at 153–154.

When questioned about the effect of the bill on present law, Rich replied that it would not extend the contributory infringement doctrine unless "you take the point of view that there is no such things [*sic*] as contributory infringement today." *Id.*, at 158. He rejected the suggestion that the legislation would return the law of contributory infringement to the *A. B. Dick* era, and he reminded the Subcommittee that the law "would not touch the result of the Carbice decision." 1951 Hearings, at 161. Rich concluded his opening testimony with this explanation of subsection (d):

> "It deals with the misuse doctrine, and the reason it is necessary is that the Supreme Court has made it abundantly clear that there exist in the law today two doc-

trines, contributory infringement on the one hand, and misuse on the other, and that, where there is a conflict, the misuse doctrine must prevail because of the public interest inherently involved in patent cases.

"Other decisions following Mercoid have made it quite clear that at least some courts are going to say that any effort whatever to enforce a patent against a contributory infringer is in itself misuse. . . . Therefore we have always felt—we who study this subject particularly—that to put any measure of contributory infringement into law you must, to that extent and to that extent only, specifically make exceptions to the misuse doctrine, and that is the purpose of paragraph (d).

"It goes with, supports, and depends upon paragraph (c)." *Id.*, at 161–162.

The Department of Justice, now represented by Wilbur L. Fugate of the Antitrust Division, broadly objected to "writing the doctrine of contributory infringement into the law." *Id.*, at 165. Its most strenuous opposition was directed at what was to become § 271 (d). Fugate warned that this provision "would have the effect of wiping out a good deal of the law relating to misuse of patents, particularly with reference to tying-in clauses." *Ibid.* He repeatedly asserted that the language of subsection (d) was unclear, and that it was impossible to tell how far it would serve to insulate patentees from charges of misuse. See *id.*, at 167–169. But as the Department construed it, the subsection would "seriously impair the doctrine of misuse of patents in favor of the doctrine of contributory infringements." *Id.*, at 168. Fugate would not say that any of the three acts protected by subsection (d) were *per se* illegal, but he felt that they could become evidence of misuse in some contexts. *Id.*, at 168–169.

When Representative Crumpacker challenged Fugate's interpretation of the statute, Fugate replied that Rich had advanced the same construction, and he called upon Rich to

say whether he agreed. *Id.*, at 169. The following colloquy then took place:

> "Mr. RICH: I will agree with [Mr. Fugate's interpretation] to this extent: That as I testified it is necessary to make an exception to misuse to the extent that you revive contributory infringement in paragraph (c), and this whole section (d) is entirely dependent on (c). Where (d) refers to contributory infringement, it only refers to contributory infringement as defined in (c) and nothing more.
>
> "Mr. CRUMPACKER: In other words, all it says is that bringing an action against someone who is guilty of contributory infringement is not a misuse of the patent.
>
> "Mr. RICH: That is true." *Ibid.*

Rich and Fugate then discussed the law in the courts before and after the *Mercoid* decisions. In an effort to clarify the intendment of the statute, Congressman Rogers asked Rich to identify misuse decisions exemplifying the acts specified in the three parts of subsection (d). Rich identified the *Leitch* and *Carbice* cases as examples of situations where deriving revenue from acts that would be contributory infringement was held to be evidence of misuse; he stated that the *Mercoid* cases exemplified misuse from licensing others; and he referred to *Stroco Products, Inc.* v. *Mullenbach, supra,* as an example of a case where the mere bringing of an action against contributory infringers was found to exemplify misuse. 1951 Hearings, at 174–175. He again reminded the Subcommittee that the scope of subsection (d) was implicitly limited by the restrictive definition of contributory infringement in subsection (c), and he assured the Subcommittee that "[i]f [a patentee] has gone beyond those and done other acts which could be misuse, then the misuse doctrine would be applicable." *Id.*, at 175. As an example of such "other acts," he suggested that a patentee would be guilty of misuse if he tried to license others to produce staple articles used in a patented invention. *Ibid.*

C

Other legislative materials that we have not discussed bear as well on the meaning to be assigned to § 271 (d); but the materials that we have culled are exemplary, and they amply demonstrate the intended scope of the statute. It is the consistent theme of the legislative history that the statute was designed to accomplish a good deal more than mere clarification. It significantly changed existing law, and the change moved in the direction of expanding the statutory protection enjoyed by patentees. The responsible congressional Committees were told again and again that contributory infringement would wither away if the misuse rationale of the *Mercoid* decisions remained as a barrier to enforcement of the patentee's rights. They were told that this was an undesirable result that would deprive many patent holders of effective protection for their patent rights. They were told that Congress could strike a sensible compromise between the competing doctrines of contributory infringement and patent misuse if it eliminated the result of the *Mercoid* decisions yet preserved the result in *Carbice*. And they were told that the proposed legislation would achieve this effect by restricting contributory infringement to the sphere of nonstaple goods while exempting the control of such goods from the scope of patent misuse. These signals cannot be ignored. They fully support the conclusion that, by enacting §§ 271 (c) and (d), Congress granted to patent holders a statutory right to control nonstaple goods that are capable only of infringing use in a patented invention, and that are essential to that invention's advance over prior art.

We find nothing in this legislative history to support the assertion that respondent's behavior falls outside the scope of § 271 (d).[20] To the contrary, respondent has done nothing

[20] Petitioners argue that the exchange in the 1951 Hearings among Representative Crumpacker, Mr. Rich, and Mr. Fugate, see *supra*, at 210–212, counters our interpretation of the legislative history. They argue

that would extend its right of control over unpatented goods beyond the line that Congress drew. Respondent, to be sure, has licensed use of its patented process only in connection with purchases of propanil. But propanil is a *nonstaple* product, and its herbicidal property is the heart of respondent's invention. Respondent's method of doing business is thus essentially the same as the method condemned in the *Mercoid* decisions, and the legislative history reveals that § 271 (d) was designed to retreat from *Mercoid* in this regard.

There is one factual difference between this case and *Mercoid:* the licensee in the *Mercoid* cases had offered a sublicense to the alleged contributory infringer, which offer had been refused. *Mercoid II,* 320 U. S., at 683. Seizing upon this difference, petitioners argue that respondent's unwillingness to offer similar licenses to its would-be competitors in the manufacture of propanil legally distinguishes this case and sets it outside § 271 (d). To this argument, there are at

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that Mr. Fugate initially interpreted § 271 (d) to allow tying arrangements, that this constuction was rejected by Crumpacker and disavowed by Rich, and that the contention ultimately was dropped by the Department of Justice. Although the relevant passage is not entirely free from doubt, we do not find petitioners' interpretation of it particularly persuasive. Rather, it appears that Fugate initially interpreted the statute to insulate the patentee from *any* charge of misuse so long as he also engaged in at least one of the practices specified in the statute. See 1951 Hearings, at 167. Representative Crumpacker demurred from this interpretation, and Rich reminded the Subcommittee of the limitation implicitly built into the scope of § 271 (d) by the restrictive definition of contributory infringement in § 271 (c). 1951 Hearings, at 169. Rich subsequently did state that an attempt to secure a monopoly on "unpatented articles" still would be patent misuse. *Id.,* at 172–173. But in the context of his clarification regarding the scope of subsection (c), his agreement to this proposition appears to be based on an assumption that the unpatented articles referred to were staples of commerce. Taken as a whole, this exchange suggests that § 271 (d) would afford no defense to a charge of misuse for an attempt to control staple materials; it does not, in our view, support the further conclusion that an attempt to control nonstaple materials should be subject to the same charge.

least three responses. First, as we have noted, § 271 (d) permits such licensing but does not require it. Accordingly, petitioners' suggestion would import into the statute a requirement that simply is not there. Second, petitioners have failed to adduce any evidence from the legislative history that the offering of a license to the alleged contributory infringer was a critical factor in inducing Congress to retreat from the result of the *Mercoid* decisions. Indeed, the *Leeds & Catlin* decision, which did not involve such an offer to license, was placed before Congress as an example of the kind of contributory infringement action the statute would allow. Third, petitioners' argument runs contrary to the long-settled view that the essence of a patent grant is the right to exclude others from profiting by the patented invention. 35 U. S. C. § 154; see *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 424–425 (1908); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 135 (1969). If petitioners' argument were accepted, it would force patentees either to grant licenses or to forfeit their statutory protection against contributory infringement. Compulsory licensing is a rarity in our patent system,[21] and we decline to manufacture such a requirement out of § 271 (d).

IV

Petitioners argue, finally, that the interpretation of § 271 (d) which we have adopted is foreclosed by decisions of this

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[21] Compulsory licensing of patents often has been proposed, but it has never been enacted on a broad scale. See, *e. g.*, Compulsory Licensing of Patents under some Non-American Systems, Study of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 1, 2 (Comm. Print 1959). Although compulsory licensing provisions were considered for possible incorporation into the 1952 revision of the patent laws, they were dropped before the final bill was circulated. See House Committee on the Judiciary, Proposed Revision and Amendment of the Patent Laws: Preliminary Draft, 81st Cong., 2d Sess., 91 (Comm. Print 1950).

Court following the passage of the 1952 Act. They assert that in subsequent cases the Court has continued to rely upon the *Mercoid* decisions, and that it has effectively construed § 271 (d) to codify the result of those decisions, rather than to return the doctrine of patent misuse to some earlier stage of development. We disagree.

The cases to which petitioners turn for this argument include some that have cited the *Mercoid* decisions as evidence of a general judicial "hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *United States* v. *Loew's, Inc.*, 371 U. S. 38, 46 (1962); see also *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 343–344 (1971). These decisions were not directly concerned with the doctrine of contributory infringement, and they did not require the Court to evaluate § 271 (d) or its impact on the holdings in *Mercoid*. Like other cases that do not specifically mention those decisions, see, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S., at 136, they state the general thrust of the doctrine of patent misuse without attending to its specific statutory limitations.

In another case, *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), the Court dealt only with the scope of direct infringement under § 271 (a). The question under consideration was whether a patent is infringed when unpatented elements are assembled into the combination outside the United States. The Court held that such assembly would not have constituted direct infringement prior to the enactment of § 271 (a), and it concluded that enactment of the statute effected no change in that regard. The Court cited *Mercoid I* for the well-established proposition that unless there has been direct infringement there can be no contributory infringement. 406 U. S., at 526. Again, the Court did not have occasion to focus on the meaning of § 271 (d).

The only two decisions that touch at all closely upon the issues of statutory construction presented here are *Aro Mfg.*

Co. v. *Convertible Top Co.*, 365 U. S. 336 (1961) (*Aro I*), and *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476 (1964) (*Aro II*). These decisions emerged from a single case involving an action for contributory infringement based on the manufacture and sale of a specially cut fabric designed for use in a patented automobile convertible top combination. In neither case, however, did the Court directly address the question of § 271 (d)'s effect on the law of patent misuse.

The controlling issue in *Aro I* was whether there had been any *direct* infringement of the patent. The Court held that purchasers of the specially cut fabric used it for "repair" rather than "reconstruction" of the patented combination; accordingly, under the patent law they were not guilty of infringement. 365 U. S., at 340, 346. Since there was no direct infringement by the purchasers, the Court held that there could be no contributory infringement by the manufacturer of the replacement tops. This conclusion rested in part on a holding that § 271 (c) "made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement." *Id.*, at 341. It in no way conflicts with our decision.

As petitioners observe, *Aro I* does quote certain passages from the *Mercoid* decisions standing for the proposition that even single elements constituting the heart of a patented combination are not within the scope of the patent grant. 365 U. S., at 345. In context, these references to *Mercoid* are not inconsonant with our view of § 271 (d). In the course of its decision, the Court eschewed the suggestion that the legal distinction between "reconstruction" and "repair" should be affected by whether the element of the combination that has been replaced is an "essential" or "distinguishing" part of the invention. 365 U. S., at 344. The Court reasoned that such a standard would "ascrib[e] to one element of the patented combination the status of patented invention in itself," and it drew from the *Mercoid* cases only to the extent that they described limitations on the scope of the patent

grant. 365 U. S., at 344–345. In a footnote, the Court carefully avoided reliance on the misuse aspect of those decisions. *Id.*, at 344, n. 10. Accordingly, it had no occasion to consider whether or to what degree § 271 (d) undermined the validity of the *Mercoid* patent misuse rationale.[22]

Aro II is a complicated decision in which the Court mustered different majorities in support of various aspects of its opinion. See 377 U. S., at 488, n. 8. After remand from *Aro I*, it became clear that the Court's decision in that case had not eliminated all possible grounds for a charge of contributory infringement. Certain convertible top combinations had been sold without valid license from the patentee. Because use of these tops involved direct infringement of the patent, there remained a question whether fabric supplied for their repair might constitute contributory infringement notwithstanding the Court's earlier decision.

Aro II decided several questions of statutory interpretation under § 271. First, it held that repair of an unlicensed combination was direct infringement under the law preceding enactment of § 271, and that the statute did not effect any change in this regard. 377 U. S., at 484. Like the constructions of § 271 (a) in *Aro I* and *Deepsouth Packing Co.*, this conclusion concerns a statutory provision not at issue in this case.

Second, the Court held that supplying replacement fabrics specially cut for use in the infringing repair constituted contributory infringement under § 271 (c). The Court held that the specially cut fabrics, when installed in infringing equipment, qualified as nonstaple items within the language of § 271 (c), and that supply of similar materials for infringing repair had been treated as contributory infringement under the judicial law that § 271 (c) was designed to codify. 377

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[22] In his concurring opinion in *Aro I*, Mr. Justice Black did address the scope of § 271 (d). 365 U. S., at 346, 347–350. His conclusion is inconsistent with today's decision.

U. S., at 485–488. It also held that § 271 (c) requires a showing that an alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing. 377 U. S., at 488–491. We regard these holdings as fully consistent with our understanding of § 271 (c). In any event, since petitioners have conceded contributory infringement for the purposes of this decision, the scope of that subsection is not directly before us.

Third, the Court held that the alleged contributory infringer could not avoid liability by reliance on the doctrine of the *Mercoid* decisions. Although those decisions had cast contributory infringement into some doubt, the Court held that § 271 was enacted "for the express purpose . . . of overruling any blanket invalidation of the [contributory infringement] doctrine that could be found in the *Mercoid* opinions." 377 U. S., at 492. Although our review of the legislative history finds a broader intent, it is not out of harmony with *Aro II*'s analysis. The Court explicitly noted that a defense of patent misuse had not been pressed. *Id.*, at 491. Accordingly, its discussion of legislative history was limited to those materials supporting the observation, sufficient for purposes of the case, that any direct attack on the contributory infringement doctrine in its entirety would be contrary to the manifest purpose of § 271 (c). Since the Court in *Aro II* was not faced with a patent misuse defense, it had no occasion to consider other evidence in the hearings relating to the scope of § 271 (d).

Finally, in a segment of the Court's opinion that commanded full adherence of only four Justices, 377 U. S., at 493–500, it was stated that an agreement in which the patentee had released some purchasers of infringing combinations from liability defeated liability for contributory infringement with respect to replacement of convertible tops after the agreement went into effect. The plurality rejected the patentee's attempt to condition its release by reserving

"rights in connection with future sales of replacement fabrics." *Id.*, at 496. It relied on the *Carbice* and *Mercoid* decisions, as well as *United States* v. *Loew's, Inc., supra,* for the proposition that a patentee "cannot impose conditions concerning the unpatented supplies, ancillary materials, or components with which the use [of a patented combination] is to be effected." 377 U. S., at 497. This statement is qualified by the circumstances to which it applied. Because the Court already had determined in *Aro I* that replacement of wornout convertible top fabric constituted a permissible repair of the combination, the agreement sought to control an unpatented article in the context of a noninfringing use. The determination that the agreement defeated liability does not reflect resort to the principles of patent misuse; rather it betokens a recognition that the patentee, once it had authorized use of the combination, could not manufacture contributory infringement by contract where under the law there was none.

Perhaps the quintessential difference between the *Aro* decisions and the present case is the difference between the primary-use market for a chemical process and the replacement market out of which the *Aro* litigation arose. The repair-reconstruction distinction and its legal consequences are determinative in the latter context, but are not controlling here. Instead, the staple-nonstaple distinction, which *Aro I* found irrelevant to the characterization of replacements, supplies the controlling benchmark. This distinction ensures that the patentee's right to prevent others from contributorily infringing his patent affects only the market for the invention itself. Because of this significant difference in legal context, we believe our interpretation of § 271 (d) does not conflict with these decisions.

V

Since our present task is one of statutory construction, questions of public policy cannot be determinative of the outcome

unless specific policy choices fairly can be attributed to Congress itself. In this instance, as we have already stated, Congress chose a compromise between competing policy interests. The policy of free competition runs deep in our law. It underlies both the doctrine of patent misuse and the general principle that the boundary of a patent monopoly is to be limited by the literal scope of the patent claims. But the policy of stimulating invention that underlies the entire patent system runs no less deep. And the doctrine of contributory infringement, which has been called "an expression both of law and morals," *Mercoid I*, 320 U. S., at 677 (Frankfurter, J., dissenting), can be of crucial importance in ensuring that the endeavors and investments of the inventor do not go unrewarded.

It is, perhaps, noteworthy that holders of "new use" patents on chemical processes were among those designated to Congress as intended beneficiaries of the protection against contributory infringement that § 271 was designed to restore. See 1948 Hearings, at 4, 5, 18. We have been informed that the characteristics of practical chemical research are such that this form of patent protection is particularly important to inventors in that field. The number of chemicals either known to scientists or disclosed by existing research is vast. It grows constantly, as those engaging in "pure" research publish their discoveries.[23] The number of these chemicals that have known uses of commercial or social value, in contrast, is small. Development of new uses for existing chemicals is thus a major component of practical chemical research.

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[23] As of March 1980, the Chemical Registry System maintained by the American Chemical Society listed in excess of 4,848,000 known chemical compounds. The list grows at a rate of about 350,000 per year. The Society estimates that the list comprises between 50% and 60% of all compounds that ever have been prepared. See Brief for American Chemical Society as *Amicus Curiae* 4–5.

It is extraordinarily expensive.[24] It may take years of unsuccessful testing before a chemical having a desired property is identified, and it may take several years of further testing before a proper and safe method for using that chemical is developed.[25]

Under the construction of § 271 (d) that petitioners advance, the rewards available to those willing to undergo the time, expense, and interim frustration of such practical research would provide at best a dubious incentive. Others could await the results of the testing and then jump on the profit bandwagon by demanding licenses to sell the unpatented, nonstaple chemical used in the newly developed process. Refusal to accede to such a demand, if accompanied by any attempt to profit from the invention through sale of the unpatented chemical, would risk forfeiture of any patent protection whatsoever on a finding of patent misuse. As a result, noninventors would be almost assured of an opportunity to share in the spoils, even though they had contributed nothing to the discovery. The incentive to await the discoveries of others might well prove sweeter than the incentive to take the initiative oneself.

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[24] For example, the average cost of developing one new pharmaceutical drug has been estimated to run as high as $54 million. Hansen, The Pharmaceutical Development Process: Estimates of Development Costs and Times and the Effects of Proposed Regulatory Changes, in Issues in Pharmaceutical Economics 151, 180 (R. Chien ed. 1979).

[25] See Wardell, The History of Drug Discovery, Development, and Regulation, in Issues in Pharmaceutical Economics 1, 8–10 (R. Chien ed. 1979) (describing modern techniques and testing requirements for development of pharmaceuticals). Although testing of chemicals destined for pharmaceutical use may be the most extensive, testing for environmental effects of chemicals used in industrial or agricultural settings also can be both expensive and prolonged. See A. Wechsler, J. Harrison, & J. Neumeyer, Evaluation of the Possible Impact of Pesticide Legislation on Research and Development Activities of Pesticide Manufacturers 18–52 (Environmental Protection Agency, Office of Pesticide Programs, pub. no. 540/9–75–018, 1975). See generally A. Baines, F. Bradbury, & C. Suckling, Research in the Chemical Industry 82–163 (1969).

Whether such a regime would prove workable, as petitioners urge, or would lead to dire consequences, as respondent and several *amici* insist, we need not predict. Nor do we need to determine whether the principles of free competition could justify such a result. Congress' enactment of § 271 (d) resolved these issues in favor of a broader scope of patent protection. In accord with our understanding of that statute, we hold that Rohm & Haas has not engaged in patent misuse, either by its method of selling propanil, or by its refusal to license others to sell that commodity. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

For decades this Court has denied relief from contributory infringement to patent holders who attempt to extend their patent monopolies to unpatented materials used in connection with patented inventions. The Court now refuses to apply this "patent misuse" principle in the very area in which such attempts to restrain competition are most likely to be successful. The Court holds exempt from the patent misuse doctrine a patent holder's refusal to license others to use a patented process unless they purchase from him an unpatented product that has no substantial use except in the patented process. The Court's sole justification for this radical departure from our prior construction of the patent laws is its interpretation of 35 U. S. C. § 271, a provision that created exceptions to the misuse doctrine and that we have held must be strictly construed "in light of this Nation's historical antipathy to monopoly," *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530 (1972). The Court recognizes, as it must, that § 271 does not on its face exempt the broad category of nonstaple materials from the misuse doctrine, yet construes it to do so based

on what it has gleaned from the testimony of private patent lawyers given in hearings before congressional Committees and from the testimony of Department of Justice attorneys opposing the bill. The Court has often warned that in construing statutes, we should be "extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws." *S&E Contractors, Inc.* v. *United States*, 406 U. S. 1, 13, n. 9 (1972). We have expressed similar reservations about statements of the opponents of a bill: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegman Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951). *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964). Here, nothing in support of the Court's novel construction is to be found in the Committee Reports or in the statements of those Congressmen or Senators sponsoring the bill. The Court focuses only on the opposing positions of nonlegislators, none of which I find sufficient to constitute that "clear and certain signal from Congress" that is required before construing the 1952 Patent Act to extend the patent monopoly beyond pre-existing standards.

I

All parties to this litigation, as well as the courts below, agree that were it not for § 271 (d), respondent's refusal to license the use of its patent except to those who purchase unpatented propanil from it would be deemed patent misuse and would bar recovery from contributory infringement. 599 F. 2d 685, 688 (CA5 1979). In a long line of decisions commencing with *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917), this Court has denied recovery to patent holders who attempt to extend their patent monopoly to unpatented materials used in connection with patented inventions. In *Motion Picture Patents* the Court held that

a license to use a patented motion picture projector could not be conditioned on the purchase of unpatented film from the patent holder. The Court emphasized that

> "the exclusive right granted in every patent must be limited to the invention described in the claims of the patent and that it is not competent for the owner of a patent . . . to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention," *id.*, at 516.

Accordingly, the Court refused to enforce the patent against contributory infringers because "it would be gravely injurious to [the] public interest," which it deemed "more a favorite of the law than is the promotion of private fortunes." *Id.*, at 519.[1]

The "patent misuse" doctrine, as it came to be known, was further enunciated in *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931). In *Carbice* the Court unanimously denied relief for contributory infringement where a patentee required users of its combination patent to purchase from its exclusive licensee unpatented material (dry ice) that was an essential component of the patented com-

[1] The Court rejected the argument that the licensing scheme was justified because it reduced the cost of the patented invention. The Court noted:

"It is argued as a merit of this system of sale . . . that the public is benefited by the sale of the machine at what is practically its cost and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine." 243 U. S., at 517.

bination (a container for transporting frozen goods). The Court acknowledged that the owner of the process patent properly could "prohibit entirely the manufacture, sale, or use of such packages," or "grant licenses upon terms consistent with the limited scope of the patent monopoly" and "charge a royalty or license fee." However, the Court concluded that the patent holder "may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor; and if it does so, relief against one who supplies such unpatented materials will be denied." *Id.*, at 31. The Court deemed immaterial the fact that "the unpatented refrigerant is one of the necessary elements of the patented product," for the patent holder had "no right to be free from competition in the sale of solid carbon dioxide" (dry ice) and "this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used." *Id.*, at 33. If the owner of a combination patent were permitted to restrain competition in "unpatented materials used in its manufacture," then "[t]he owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation." *Id.*, at 32.

In *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), the Court, without dissent, denied relief to the holder of a process patent who licensed only those who purchased from it an unpatented material used in the patented process. Rather than expressly tying the grant of a patent license to purchase of unpatented material, the patent holder in *Leitch* merely sold unpatented materials used in the patented process, thereby granting purchasers an implied license to use the patent. The Court deemed this distinction to be "without legal significance" because "every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited." *Id.*, at 463. The Court emphasized that the patent misuse doctrine "applies whatever the nature of the

device by which the owner of a patent seeks to effect such unauthorized extension of the monopoly." *Ibid.*

Four years later, the Court, again without dissent, applied the patent misuse doctrine to prohibit recovery against a direct infringer by a patent holder who required purchasers of a patented product to buy from it unpatented material for use in the patented product. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942). In a companion case the Court denied relief from contributory infringement to a patent holder who licensed only those who purchased from it an unpatented component product specially designed for use in the patented process. *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942). In *B. B. Chemical* the lower courts had rejected the patent owner's attempt to distinguish previous patent misuse cases as involving efforts to control the use of staple materials with substantial noninfringing uses. 117 F. 2d 829, 834–835 (CA1 1941). This Court affirmed without dissent, holding that the patent misuse doctrine barred relief "in view of petitioner's use of the patent as the means of establishing a limited monopoly in its unpatented materials," *B. B. Chemical Co.* v. *Ellis*, *supra*, at 497, and necessarily rejecting petitioner's position that patent misuse was limited to staple products and did not apply when the alleged infringer went beyond selling an unpatented staple material and manufactured and sold materials useful only in the patented construct.[2] The Court rejected the patent holder's argument

[2] The patent involved in *B. B. Chemical Co.* v. *Ellis* covered a process for reinforcing shoe insoles by applying to them strips of reinforcing material coated with an adhesive. Rather than expressly licensing shoe manufacturers to use the patented process, the patentee sold them precoated reinforcing material which had been "slit into strips of suitable width for use by the patented method," 314 U. S., at 496, thereby granting purchasers implied licenses to use the patent. The patentee argued in the Court of Appeals for the First Circuit that application of the patent misuse doctrine is limited "to those situations in which the alleged contributory infringer supplies staple articles of commerce." 117 F. 2d 829, 834 (1941). As the Court of Appeals noted, the patentee "insists that where the articles

that it should be able to license only purchasers of the unpatented material because this was the only practicable way to exploit its process patent. "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot

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supplied are specially manufactured for use in this particular [patented] process, relief is not to be denied the patentee no matter what his course of business." *Ibid.* The Court of Appeals, expressly agreeing with the Court of Appeals for the Second Circuit and disagreeing with the contrary view of the Court of Appeals for the Ninth Circuit, rejected this view. It noted: "The language of [*Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), and *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931),] is extremely comprehensive and is by no means restricted to staple articles. . . . There is every indication that the Carbice and Leitch cases apply to specially designed non-patented articles. . . . [T]he emphasis is on the fact that the articles sold by the alleged contributory infringers were not covered by the plaintiff's patent although it conducted its business as though they were." *Id.*, at 834–835.

The patentee-petitioner pursued the staple-nonstaple distinction in its petition for certiorari, arguing that the patent misuse principle of *Carbice Corp.* v. *American Patents Development Corp.*, *supra*, and *Leitch Mfg. Co.* v. *Barber Co.*, *supra*, should not bar relief because the unpatented materials furnished by the defendants were not "staple articles of commerce" but rather were "especially designed and prepared for use in the process of the patent." Pet. for Cert., O. T. 1941, No. 75, p. 10. It also noted the conflict among the Courts of Appeals with respect to nonstaples and patent misuse and urged that certiorari be granted on this basis. The Court granted certiorari, and the Court of Appeals was affirmed over petitioner's arguments that the patent misuse doctrine should not bar relief when the defendant did more than make and sell an unpatented staple. Brief for Petitioner, O. T. 1941, No. 75, pp. 21–22. Petitioner's brief also called attention to the conflict in the cases, *id.*, at 36–37, and both respondents and the United States as *amicus curiae* argued that nonstaples, as well as staples, were subject to the misuse doctrine. Brief for Respondents, O. T. 1941, No. 75, pp. 11–12; Brief for United States as *Amicus Curiae*, O. T. 1941, No. 75, pp. 12–13. The issue was plainly not abandoned and was part and parcel of petitioner's argument that defendant went beyond selling a staple by manufacturing and selling materials expressly designed for and usable only as part of the patented use. The argument was rejected on the authority of the companion case, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942).

avail himself of its benefits within the limits of the grant." 314 U. S., at 498. However, the Court reserved the question whether the patent misuse doctrine would apply if the patent holder also was willing to license manufacturers who did not purchase from it the unpatented material. *Ibid.*[3]

These decisions established, even before this Court's decisions in the *Mercoid* cases, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (*Mercoid I*), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) (*Mercoid II*), that the patent misuse doctrine would bar recovery by a patent holder who refused to license others to use a patented process unless they purchased from him an unpatented product for use in the process.[4] Such

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[3] Two years after *B. B. Chemical,* in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944), the Court was confronted with the question reserved in *B. B. Chemical:* whether the patent misuse doctrine would apply to a patent holder whose offers to license contributory infringers had been refused.

[4] Although the Court is willing to concede that *B. B. Chemical* "arguably involved an application of the misuse doctrine to an attempt to control a nonstaple material," *ante,* at 194, n. 12, it subsequently states that "among the historical precedents in this Court, only . . . *Leeds & Catlin* [*Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909),] and [the] *Mercoid* cases bear significant factual similarity to the present controversy." *Ante,* at 198. The latter statement is particularly puzzling because *B. B. Chemical,* like this case, involved a patentee's initial refusal to license others to sell nonstaples, while *Mercoid,* unlike this case, involved a contributory infringer's refusal to accept proffered licenses.

Moreover, the Court implies, *ante,* at 195, n. 13, that until *Mercoid,* there was division in the Courts of Appeals with regard to whether the patent misuse doctrine applied to patentees attempting to control nonstaple items. Yet all of the authorities the Court cites are pre-*B. B. Chemical,* and it is apparent that in *B. B. Chemical* as in *Mercoid,* the Court treated staple and nonstaple materials alike insofar as patent misuse was concerned. It is especially interesting that the Court cites *J. C. Ferguson Works* v. *American Lecithin Co.*, 94 F. 2d 729, 731 (CA1), cert. denied, 304 U. S. 573 (1938), as a decision supporting the inapplicability of the misuse doctrine to efforts to control nonstaples. That case was a decision

conduct was deemed patent misuse because it involved an attempt to extend the patent monopoly beyond the scope of the invention to restrain competition in the sale of unpatented materials. This conduct was deemed misuse regardless of whether it was effected by means of express conditions in patent licenses or by a policy of granting only implied licenses to purchasers of unpatented materials, and even though unpatented materials "tied" to the license had no use other than as an integral part of the patented structure.

II

Respondent's conduct in this case clearly constitutes patent misuse under these pre-*Mercoid* decisions because respondent refuses to license others to use its patented process unless they purchase from it unpatented propanil. The fact that respondent accomplishes this end through the practice of granting implied licenses to those who purchase propanil from it is as devoid of legal significance to alter this conclusion as it was in *Leitch Mfg.* 302 U. S., at 463, and *B. B. Chemical,* 314 U. S., at 498. Moreover, the fact that propanil is a nonstaple product having no substantial use except in the patented process has been without significance at least since *B. B. Chemical* and only serves to reinforce the conclusion that respondent is attempting to extend the patent monopoly to unpatented materials. Because propanil has no substantial noninfringing use, it cannot be sold without incurring liability for contributory infringement unless the vendor has a license to sell propanil or its vendee has an unconditional license to use the patented process. Respondent's refusal to license those who do not purchase propanil from it thus effectively

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by the Court of Appeals for the First Circuit, and the same Court of Appeals in *B. B. Chemical* expressly indicated that its decision in *J. C. Ferguson* did not imply that the patent misuse doctrine was inapplicable to a patentee's efforts to control nonstaples. 117 F. 2d, at 834–835. In *B. B. Chemical* the Court of Appeals held that the patent misuse doctrine applied to nonstaples as well as staples, and this Court affirmed.

subjects all competing sellers of propanil to liability for contributory infringement. As the Court recognizes, *ante*, at 201, if this conduct is not deemed patent misuse, respondent will acquire the ability "to eliminate competitors and thereby to control the market" for propanil even though propanil is unpatented, unpatentable, and in the public domain.[5] This would permit an even more complete extension of the patent monopoly to a market for unpatented materials than would result from a patentee's attempts to control sales of staples that have substantial alternative uses outside of the patented process.

III

Despite the undoubted exclusionary impact of respondent's conduct on the market for unpatented propanil, the Court holds that such conduct no longer constitutes patent misuse solely because of congressional enactment of 35 U. S. C. § 271. Section 271 is no stranger to this Court. Our previous attempts to construe this statute have been guided by the principle that "we should not expand patent rights by overruling or modifying our prior cases construing the patent statutes, unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S., at 531. "[I]n light of this Nation's historical antipathy to monopoly," we have concluded that "[w]e would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought." *Id.*, at 530, 531. These principles are not less applicable to, and should

[5] Respondent's efforts to use its process patent to exclude, in effect, propanil from the public domain are particularly ironic because in prior litigation respondent successfully maintained, when sued for infringement, that propanil was unpatentable for lack of novelty. *Monsanto Co.* v. *Rohm & Haas Co.*, 456 F. 2d 592 (CA3 1972).

resolve the statutory question presented in, this case, because as the Court concedes, the language of § 271 (d) does not itself resolve the question and because nothing in the legislative materials to which the Court is forced to turn furnishes the necessary evidence of congressional intention.[6]

Section 271 (d) provides:

> "No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

The plain language of § 271 (d) indicates that respondent's conduct is not immunized from application of the patent misuse doctrine. The statute merely states that respondent may (1) derive revenue from sales of unpatented propanil, (2) license others to sell propanil, and (3) sue unauthorized sellers of propanil. While none of these acts can be deemed patent misuse if respondent is "otherwise entitled to relief," the statute does not state that respondent may exclude all competitors from the propanil market by refusing to license all those who do not purchase propanil from it. This is the very conduct that constitutes patent misuse under the tradi-

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[6] Although the Court acknowledges that we previously have construed § 271, *ante*, at 215–220, it ignores the principles of statutory construction followed in those cases apparently because the cases did not involve the precise question presented in this case. The Court fails to explain, however, why the need for "a clear and certain signal from Congress" is any less urgent in this case.

tional doctrine; thus the fact that respondent may have engaged in one or more of the acts enumerated in § 271 (d) does not preclude its conduct from being deemed patent misuse.

The Court of Appeals conceded that the foregoing would be "a plausible construction" of the statutory language, 599 F. 2d, at 688,[7] yet it chose instead to interpret subsection (d)(1) as granting respondent the "right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention." *Id.*, at 704. The court based this conclusion on the reasoning that "the rights to license another to sell [nonstaple] unpatented items would be rendered worthless if the only right conferred by (d)(1) were the right to sell the item as one competitor among many freely competing." *Id.*, at 703. This reasoning not only ignores the fact that royalties may be collected from competitors selling unpatented nonstaples, who still must obtain licenses from the patentee,[8] but it also is fundamentally inconsistent with the congressional policy "to preserve and foster competition" in the sale of unpatented materials, a policy that, as we have recognized, survived enactment of § 271. *Deepsouth Packing Co.* v. *Laitram Corp.*, *supra*, at 530; *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336 (1961) (*Aro I*); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964) (*Aro II*). Subsection (d)(1) leaves respondent free to "deriv[e] revenue" from sales of propanil

[7] The Court of Appeals noted not only that petitioner's interpretation of § 271 was "plausible," but also that it is supported by numerous commentators, that "the legislative history [of § 271] is not crystal clear," and that this Court's subsequent construction of § 271 "cut against" its reading of the statute. 599 F. 2d, at 688, 703, 705–706, and n. 29.

[8] Because respondent may collect royalties on these licenses, the right to license competing sellers of propanil is not without economic value. In any event, even if it is more efficient or more profitable for respondent to collect its returns by exacting monopoly profits from the sale of propanil, this does not justify extension of the patent monopoly to the market for unpatented materials. *B. B. Chemical Co.* v. *Ellis*, 314 U. S., at 498; see n. 1, *supra*.

without thereby being deemed guilty of patent misuse; but it does not free respondent to derive monopoly profits from the sale of an unpatented product by refusing to license competitors that do not purchase the unpatented product from it.[9]

The Court acknowledges that respondent refused to license others to sell propanil, but it observes that "nothing on the face of the statute requires it to do so." *Ante*, at 202; cf. *ante*, at 213–214. As much could be conceded, but it would not follow that respondent is absolved from a finding of patent misuse. Section 271 (d) does not define conduct that constitutes patent misuse; rather it simply outlines certain conduct that is not patent misuse. Because the terms of the statute are terms of exception, the absence of any express mention of a licensing requirement does not indicate that respondent's refusal to license others is protected by § 271 (d). This much seems elementary.[10]

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[9] Like the Court of Appeals, this Court concludes that, despite the silence of the statutory language, § 271 (d) must "effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods." *Ante*, at 201. While it recognizes the anticompetitive impact of such a holding, the Court bases its conclusion on the assertion that the patentee's "power to demand royalties from others for the privilege of selling the nonstaple items itself implies that the patentee may control the market for the nonstaple good; otherwise, his 'right' to sell licenses for the marketing of the nonstaple good would be meaningless, since no one would be willing to pay him for a superfluous authorization." *Ibid.* I fail to see, however, why a license to practice a patented process would in any sense be "superfluous," for, as I have said, competitors selling propanil would still be required to obtain patent licenses from respondent. The fact that royalties could be collected on such licenses might have some effect on the propanil market, but it does not follow that respondent may refuse to grant any licenses, thereby excluding all competitors from the propanil market.

[10] The fact that respondent may not refuse to license competing sellers of propanil who do not purchase the product from it is not inconsistent with the notion that a patent holder is free to suppress his invention or to reserve it entirely to himself. Respondent may discontinue all sales

Nor does the legislative history of § 271 (d) indicate to me that Congress intended to exempt respondent's conduct from application of the patent misuse doctrine. This Court has already addressed this subject and there is at least a rough consensus on the impetus for the congressional action. In *Aro II*, *supra*, at 492, we held that "Congress enacted § 271 for the express purpose of reinstating the doctrine of contributory infringement as it had been developed by decisions prior to *Mercoid*, and of overruling any blanket invalidation of the doctrine that could be found in the *Mercoid* opinions. See, *e. g.*, 35 U. S. C. §§ 271 (c), (d); Hearings [on H. R. 3760 before Subcommittee No. 3 of House Committee on the Judiciary, 82d Cong., 1st Sess.], 159, 161–162; and the *Aro I* opinions of MR. JUSTICE BLACK, 365 U. S., at 348–349, and nn. 3–4; MR. JUSTICE HARLAN, *id.*, at 378, n. 6; and MR. JUSTICE BRENNAN, *id.*, at 365–367." As Mr. Justice Black stated in *Aro I*, § 271 (d) "was designed specifically to prevent the *Mercoid* case from being interpreted to mean that any effort to enforce a patent against a contributory infringer in itself constitutes a forefeiture of patent rights," 365 U. S., at 349, n. 4 (concurring opinion).

As these passages indicate, and as all parties agree, the impetus for enactment of § 271 was this Court's decisions in the *Mercoid* cases. Each case involved a suit by the owner of a combination patent seeking relief for contributory infringement against a company that had sold an unpatented article useful only in connection with the patented combination. Unlike the situation in *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942), the alleged contributory infringer in each case had refused an offer of a license "to make, use, and sell" components of the combination patent that was not condi-

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of propanil and all licensing of its patented process and yet itself continue to use propanil in the patented process without being guilty of patent misuse. But it may not sell propanil to others, thus granting them patent licenses by operation of law, while refusing to license competing sellers of propanil, thus effectively excluding them from the market.

tioned upon the purchase of unpatented materials. *Mid-Continent Investment Co.* v. *Mercoid Corp.*, 133 F. 2d 803, 810 (CA7 1942); *Mercoid II*, 320 U. S., at 682–683. Despite their offers to license, this Court denied relief on the grounds that the patentees were misusing their patents to extend the scope of the patent monopoly to unpatented articles useful only in connection with the patents. Mr. Justice Douglas, speaking for the Court in *Mercoid I*, concluded: "The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider." 320 U. S., at 669.

In light of the Court's suggestion that the doctrine of contributory infringement might not have survived *Mercoid I*, there was "[c]onsiderable doubt and confusion as to the scope of contributory infringement," H. R. Rep. No. 1923, 82d Cong., 2d Sess., 9 (1952); S. Rep. No. 1979, 82d Cong., 2d Sess., 8 (1952). This confusion was understandable because the *Mercoid* decisions for the first time had applied the patent misuse doctrine to situations where contributory infringers had refused to accept patent licenses that were not conditioned on the purchase of unpatented materials from the patentee. As was indicated in *Aro II*, *supra*, at 492, the express purpose for the legislation was to reinstate the doctrine of contributory infringement that existed prior to *Mercoid* and to overrule any implication that *Mercoid* made the mere act of suing for contributory infringement a form of patent misuse.

The Court nevertheless follows a course quite at odds with the Court's prior approach to the construction of § 271. Conceding that the language of the section will not itself support its result, the Court turns to the legislative history of the section. It discovers nothing favoring its position in the Committee Reports, the floor debates, or in any materials originating with the legislators who sponsored or managed the bill or who had any other intimate connection with the legislation. The Court is left with the opinions of private patent attorneys

as to the meaning of the proposed legislation and with the hearing testimony of representatives of the Department of Justice opposing the bill. We have generally been reluctant to rely on such citations for definitive guidance in construing legislation; [11] and we should not do so here, particularly when it means departing from the standards announced in our prior cases for construing the 1952 legislation.

However that may be, the testimony of the patent attorneys given in Committee hearings does not support the Court's broad holding that Congress intended to give patent holders complete control over nonstaple materials that otherwise would be in the public domain. Section 271 (c) does declare that selling a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing that the material or apparatus is especially made or especially adapted for use in an infringement of such patent, is contributory infringement, so long as the material or apparatus is not a staple article or commodity of commerce. Making or selling nonstaples especially made or adapted for use in practicing a patent is contributory infringement; but making or selling staples is not, however useful in practicing a patent.[12] But it does not follow that the patentee is never subject to the defense of patent misuse when he seeks to control the sale of a nonstaple used in connection with his patent. Section 271 (d) specifies precisely what acts he may perform with respect to the nonstaple and not be guilty of patent misuse. As the principal witness on whom the Court relies explained, these acts were specified as *exceptions* to what otherwise might have been considered patent misuse under the *Mercoid* decision. Hearings on H. R. 3760 before Subcommittee No. 3 of the

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[11] *S&E Contractors, Inc.* v. *United States*, 406 U. S. 1, 13, n. 9 (1972).

[12] Section 271 (c)'s limitation of the contributory infringement doctrine to sales of nonstaples does not establish that the exemptions contained in § 271 (d) are relevant only to infringement actions against sellers of nonstaples, for § 271 (d) is equally applicable to infringement actions brought under § 271 (b).

House Committee on the Judiciary, 82d Cong., 1st Sess., 161–162 (1951) (hereinafter 1951 Hearings).

The Court offers little to support its position that § 271 (d) was intended to put nonstaples completely beyond the reach of the misuse doctrine. Otherwise, § 271 (c) could simply have stated that the patentee could have his appropriate remedies against contributory infringement as defined in the section without regard to the defense of patent misuse. Of course, this is precisely the result the Court arrives at, but this extends the exemption far beyond what the Committees were told § 271 (d) would effect. Indeed, the representations were that, aside from the exemptions spelled out in § 271 (d), a patentee's control of nonstaples would be subject to the doctrine of patent misuse. *Ibid.*

It is also apparent that the private patent attorneys understood the 1952 Act as not destroying the defense of patent misuse but as confining the defense to its pre-*Mercoid* reach. As I have said, *B. B. Chemical* denied a patentee relief in connection with a nonstaple article but left open whether the same would be true if licenses were available to but were refused by the alleged infringers. In *Mercoid I*, as the patentee in that case emphasized in its brief here, Brief for Respondent Mid-Continent Investment Co., O. T. 1943, Nos. 54 and 55, pp. 31, 39, the defendant-infringer had repeatedly refused licenses, but the Court nevertheless held that the misuse defense barred relief. To this extent, § 271 overturned *Mercoid* and intended to arm the patentee with the power to sue unlicensed contributory infringers selling nonstaple components used in connection with the patented process. But I do not understand the Committee witnesses, when pressed in the 1951 Hearings, to suggest that § 271 (d) authorized the patentee to condition the use of his process on purchasing the unpatented material from him and to exclude from the market all other manufacturers or sellers even though they would be willing to pay a reasonable royalty to the patent owner. For example, after listening to the witness, a member of the Committee

stated: "In other words, all [§ 271 (d)] says is that bringing an action against someone who is guilty of contributory infringement is not a misuse of the patent." The witness's response was: "That is true." 1951 Hearings, at 169.

I have no quarrel with this reading of § 271, but such reading falls far short of insulating the patentee from the misuse defense when he refuses licenses to competing manufacturers of an unpatentable nonstaple and conditions use of his patented process on the user's buying the nonstaple from the patentee itself, thereby employing his patent to profit from the manufacture and sale of an article in the public domain. This was patent misuse before *Mercoid*, and I fail to find convincing evidence in the congressional materials to indicate that Congress intended to overturn the prior law in this respect.[13] It is apparent that the Court overstates the legislative record when it says, *ante*, at 213, that Congress was told not only that contributory infringement would be confined to nonstaples but also that § 271 would exempt the control of such goods from the scope of patent misuse. I find no statement such as this among those quoted or cited by the Court.[14]

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[13] The fact that § 271 was not intended to work a major repeal of the patent misuse doctrine is reflected in the treatment the legislation received on the floor of the House and Senate. As the Court of Appeals recognized, there was no debate on the House floor and scant comment in the Senate. Just prior to the Senate vote, Senator McCarran, chairman of the Judiciary Committee that had been responsible for the bill in the Senate, was asked by Senator Saltonstall: "Does the bill change the law in any way or only codify the present patent laws?" Senator McCarran replied: "It codifies the present patent laws." 98 Cong. Rec. 9323 (1952). Although Senator McCarran later referred to the desire to clarify confusion that may have arisen from *Mercoid*, there was no indication that the legislation would work a major repeal of the patent misuse doctrine.

[14] The Justice Department's opposition to congressional enactment of § 271 does not indicate that the statute was intended to immunize respondent's conduct in this case. "[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably

I should add that even if the applicability of the patent misuse doctrine to nonstaple materials was not settled until *Mercoid*, overturning *Mercoid* where the infringer refused a license, would not resolve the case where, as here, the patentee refuses licenses to others and reserves to itself the entire market for the unpatentable, nonstaple article lying in the public domain. It may be true, as the Court emphasizes, *ante*, at 197, that the concepts of contributory infringement and patent misuse rest on antithetical foundations, but it does not follow that the price of their coexistence inevitably must be the wholesale suppression of competition in the markets for unpatentable nonstaples.

The Court offers reasons of policy for its obvious extension of patent monopoly, but whether to stimulate research and development in the chemical field it is necessary to give patentees monopoly control over articles not covered by their patents is a question for Congress to decide, and I would wait for that body to speak more clearly than it has.

Accordingly, I respectfully dissent.

MR. JUSTICE STEVENS, dissenting.

This patentee has offered no licenses, either to competing sellers of propanil or to consumers, except the implied license that is granted with every purchase of propanil from it. Thus, every license granted under this patent has been conditioned on the purchase of an unpatented product from the patentee. This is a classic case of patent misuse. As MR. JUSTICE WHITE demonstrates in his dissenting opinion, nothing in 35 U. S. C. § 271 (d) excludes this type of conduct from the well-established misuse doctrine.

The Court may have been led into reaching the contrary, and in my view erroneous, conclusion by the particular facts of this case. It appears that it would not be particularly

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tend to overstate its reach." *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964).

profitable to exploit this patent by granting express licenses for fixed terms to users of propanil or by granting licenses to competing sellers. Under these circumstances, the patent may well have little or no commercial value unless the patentee is permitted to engage in patent misuse. But surely this is not a good reason for interpreting § 271 (d) to permit such misuse. For the logic of the Court's holding would seem to justify the extension of the patent monopoly to unpatented "nonstaples" even in cases in which the patent could be profitably exploited without misuse. Thus, for example, it appears that the Court's decision would allow a manufacturer to condition a long-term lease of a patented piece of equipment on the lessee's agreement to purchase tailormade—*i. e.*, nonstaple—supplies or components for use with the equipment exclusively from the patentee. Whether all of the five Members of the Court who have joined today's revision of § 271 (d) would apply their "nonstaple" exception in such a case remains to be seen. In all events, I respectfully dissent for the reasons stated in MR. JUSTICE WHITE's opinion, which I join.

UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-394. Argued February 26, 1980—Decided June 27, 1980

Section 311 (b)(3) of the Federal Water Pollution Control Act prohibits the discharge of oil into navigable waters. Section 311 (b)(5) requires any person in charge of an onshore facility to report any such discharge to the appropriate Government agency, and a failure to report subjects the person to a fine or imprisonment. Section 311 (b)(5) also provides for a form of "use immunity," by specifying that notification of the discharge or information obtained by the exploitation of such notification is not to be used against the reporting person in any criminal case, except for prosecution for perjury or for giving a false statement. Section 311 (b)(6) provides for the imposition of a "civil penalty" against any owner or operator of an onshore facility from which oil was discharged in violation of the Act. When oil escaped from a drilling facility leased by respondent and spilled into a tributary of the Arkansas River system, respondent notified the Environmental Protection Agency of the discharge, and this was reported to the Coast Guard, who assessed a $500 penalty against respondent under § 311 (b)(6). After his administrative appeal was denied, respondent filed suit in Federal District Court, seeking injunctive relief against enforcement of §§ 311 (b)(5) and (6) and collection of the penalty. The Government filed a separate suit to collect the penalty, and the suits were consolidated for trial. Prior to trial, the District Court rejected respondent's contention that the reporting requirements of § 311 (b)(5), as used to support a civil penalty under § 311 (b)(6), violated his right against compulsory self-incrimination, and ultimately the jury found that respondent's facility did, in fact, spill oil into the creek in question. The Court of Appeals reversed, holding that § 311 (b)(6) was sufficiently punitive to intrude upon the Fifth Amendment's protections against compulsory self-incrimination.

Held:

1. The penalty imposed by § 311 (b)(6) is civil and hence does not trigger the protections afforded by the Constitution to a criminal defendant. Pp. 248–251.

(a) It is clear that Congress intended in § 311 (b)(6) to impose a civil penalty upon persons in respondent's position, and to allow imposi-

tion of the penalty without regard to the procedural protections and restrictions available in criminal prosecutions. This intent is indicated by the fact that the authorized sanction is labeled a "civil penalty," and by the juxtaposition of such label with the criminal penalties set forth in § 311 (b)(5). P. 249.

(b) The fact that § 13 of the Rivers and Harbors Appropriation Act of 1899 makes criminal the conduct penalized in this case does not render the penalty under § 311 (b)(6) criminal in nature. The placement of criminal penalties in one statute and of civil penalties in another statute enacted 70 years later tends to dilute the force of the factor—the behavior to which the penalty applies is already a crime—considered, *inter alia*, in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, as indicating that a penalty is criminal in nature. Neither that factor nor any of the other factors set forth in *Mendoza-Martinez* are sufficient to render unconstitutional the congressional classification of the penalty established in § 311 (b)(6). Pp. 249–251.

2. The proceeding in which the penalty was imposed was not "quasi-criminal" so as to implicate the Fifth Amendment's protection against self-incrimination. *Boyd* v. *United States*, 116 U. S. 616, distinguished. In light of overwhelming evidence that Congress intended to create a penalty civil in all respects and weak evidence of any countervailing punitive purpose or effect, it would be anomalous to hold that § 311 (b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. Pp. 251–254.

598 F. 2d 1187, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 255. STEVENS, J., filed a dissenting opinion, *post*, p. 257.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Jacques B. Gelin,* and *Michael A. McCord.*

Stephen Jones argued the cause for respondent. With him on the brief was *David C. Butler.**

**James G. Watt* filed a brief for the Mountain States Legal Foundation et al. as *amici curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that a proceeding for the assessment of a "civil penalty" under § 311 (b)(6) of the Federal Water Pollution Control Act (FWPCA) is a "criminal case" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. We granted certiorari, 444 U. S. 939, and now reverse.

I

At the time this case arose,[1] § 311 (b)(3) of the FWPCA prohibited the discharge into navigable waters or onto adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful."[2] Section 311 (b)(5) of the Act imposed a duty upon "any person in charge of a vessel or of an onshore facility or an offshore facility" to report any discharge of oil or a hazardous substance into navigable waters to the "appropriate agency" of the United States Government. Should that person fail to supply such notification, he or she was liable to a fine of not more than $10,000 or imprisonment of not more than one year. Section 311 (b)(5) also provided for a form of "use immunity," specifying that "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." 33 U. S. C. § 1321 (b)(5).[3]

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[1] Section 311 was amended by the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95-576, 92 Stat. 2468. Except as noted, those amendments have no bearing on the present case. See nn. 2 and 4, *infra*.

[2] Section 311 (b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President.

[3] At the time in question, § 311 (b)(5) read in full:

"Any person in charge of a vessel or of an onshore facility or an offshore

Section 311 (b)(6) provided for the imposition of a "civil penalty" against "[a]ny owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation" of the Act. In 1975, that subsection called for a penalty of up to $5,000 for each violation of the Act.[4] In assessing penalties, the Secretary of the appropriate agency was to take into account "the appropriateness of such penalty to the size of the business or of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation. . . ." 33 U. S. C. § 1321 (b)(6).[5]

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facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

[4] Section 311 (b)(6) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95-576, 92 Stat. 2468, to authorize civil penalties of up to $50,000 per offense, or up to $250,000 per offense in cases where the discharge was the result of willful negligence or misconduct.

[5] At the time of the discharge in this case, § 311 (b)(6), as set forth in 33 U. S. C. § 1321(b)(6), read:

"Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered

According to § 311 (k) of the Act, funds collected from the assessment of penalties under § 311 (b)(6) were to be paid into a "revolving fund" together with "other funds received . . . under this section" and any money appropriated to the revolving fund by Congress. See 33 U. S. C. § 1321 (k). Money contained in this fund was to be used to finance the removal, containment, or dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the Act. 33 U. S. C. § 1321 (*l*). Another section of the Act allowed the United States Government to collect the costs of removal, containment, or dispersal of a discharge from the person or corporation responsible for that discharge in cases where that person or corporation had been identified. 33 U. S. C. § 1321 (f).

On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility located near Enid, Okla., and eventually found its way into Boggie Creek, a tributary of the Arkansas River system.[6] At the time of the discharge, the premises were being leased by respondent L. O. Ward, who was doing business as L. O. Ward Oil & Gas Operations. On April 2, 1975, respondent Ward notified the regional office of the Environmental Protection Agency (EPA) that a discharge of oil had taken place. Ward later submitted a more complete written report of the discharge, which was in turn forwarded to the Coast Guard, the agency responsible for assessing civil penalties under § 311 (b)(6).

After notice and opportunity for hearing, the Coast Guard assessed a civil penalty against respondent in the amount

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by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary."

[6] All parties concede that Boggie Creek is a "navigable water" within the meaning of 33 U. S. C. § 1362 (7).

of $500. Respondent filed an administrative appeal from this ruling, contending, *inter alia*, that the reporting requirements of § 311 (b)(5) of the Act violated his privilege against compulsory self-incrimination. The administrative appeal was denied.

On April 13, 1976, Ward filed suit in the United States District Court for the Western District of Oklahoma, seeking to enjoin the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA from enforcing §§ 311 (b)(5) and (6) and from collecting the penalty of $500. On June 4, 1976, the United States filed a separate suit in the same court to collect the unpaid penalty. The District Court eventually ordered the two suits consolidated for trial.

Prior to trial, the District Court rejected Ward's contention that the reporting requirements of § 311 (b)(5), as used to support a civil penalty under § 311 (b)(6), violated his right against compulsory self-incrimination. The case was tried to a jury, which found that Ward's facility did, in fact, spill oil into Boggie Creek. The District Court, however, reduced Ward's penalty to $250 because of the amount of oil that had spilled and because of its belief that Ward had been diligent in his attempts to clean up the discharge after it had been discovered.

The United States Court of Appeals for the Tenth Circuit reversed. *Ward* v. *Coleman*, 598 F. 2d 1187 (1979). Although admitting that Congress had labeled the penalty provided for in § 311 (b)(6) as civil and that the use of funds collected under that section to finance the administration of the Act indicated a "remedial" purpose for the provision, the Court of Appeals tested the statutory scheme against the standards set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963),[7] and held that § 311 (b)(6) was sufficiently

[7] The standards set forth were "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*,

punitive to intrude upon the Fifth Amendment's protections against compulsory self-incrimination. It therefore reversed and remanded for further proceedings in the collection suit.

II

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. See, *e. g.*, *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States* v. *Regan*, 232 U. S. 37, 47–48 (1914) (proof beyond a reasonable doubt required only in criminal cases).

This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. See, *e. g.*, *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972); *Helvering* v. *Mitchell*, *supra*, at 399. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 236–237. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statu-

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whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S., at 168–169 (footnotes omitted).

tory scheme was so punitive either in purpose or effect as to negate that intention. See *Flemming* v. *Nestor*, 363 U. S. 603, 617–621 (1960). In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Id.*, at 617. See also *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 237; *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956).

As for our first inquiry in the present case, we believe it quite clear that Congress intended to impose a civil penalty upon persons in Ward's position. Initially, and importantly, Congress labeled the sanction authorized in § 311 (b)(6) a "civil penalty," a label that takes on added significance given its juxtaposition with the criminal penalties set forth in the immediately preceding subparagraph, § 311 (b)(5). Thus, we have no doubt that Congress intended to allow imposition of penalties under § 311 (b)(6) without regard to the procedural protections and restrictions available in criminal prosecutions.

We turn then to consider whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co.* v. *United States*, *supra*, at 154. In making this determination, both the District Court and the Court of Appeals found it useful to refer to the seven considerations listed in *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169. This list of considerations, while certainly neither exhaustive nor dispositive, has proved helpful in our own consideration of similar questions, see, *e. g.*, *Bell* v. *Wolfish*, 441 U. S. 520, 537–538 (1979), and provides some guidance in the present case.

Without setting forth here our assessment of each of the seven *Mendoza-Martinez* factors, we think only one, the fifth, aids respondent. That is a consideration of whether "the

behavior to which [the penalty] applies is already a crime." 372 U. S., at 168–169. In this regard, respondent contends that § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 407, makes criminal the precise conduct penalized in the present case. Moreover, respondent points out that at least one federal court has held that § 13 of the Rivers and Harbors Appropriation Act defines a "strict liability crime," for which the Government need prove no scienter. See *United States* v. *White Fuel Corp.*, 498 F. 2d 619 (CA1 1974). According to respondent, this confirms the lower court's conclusion that this fifth factor "falls clearly in favor of a finding that [§ 311 (b)(6)] is criminal in nature." 598 F. 2d, at 1193.

While we agree that this consideration seems to point toward a finding that § 311 (b)(6) is criminal in nature, that indication is not as strong as it seems at first blush. We have noted on a number of occasions that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *Helvering* v. *Mitchell*, *supra*, at 399; *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 235. Moreover, in *Helvering*, where we held a 50% penalty for tax fraud to be civil, we found it quite significant that "the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions," and that "these appear in different parts of the statute. . . ." 303 U. S., at 404. See also *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 236–237. To the extent that we found significant the separation of civil and criminal penalties within the same statute, we believe that the placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tends to dilute the force of the fifth *Mendoza-Martinez* criterion in this case.

In sum, we believe that the factors set forth in *Mendoza-Martinez*, while neither exhaustive nor conclusive on the issue, are in no way sufficient to render unconstitutional the congres-

sional classification of the penalty established in § 311 (b)(6) as civil. Nor are we persuaded by any of respondent's other arguments that he has offered the "clearest proof" that the penalty here in question is punitive in either purpose or effect.

III

Our conclusion that § 311 (b)(6) does not trigger all the protections afforded by the Constitution to a criminal defendant does not completely dispose of this case. Respondent asserts that, even if the penalty imposed upon him was not sufficiently criminal in nature to trigger other guarantees, it was "quasi-criminal," and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination. He relies primarily in this regard upon *Boyd* v. *United States*, 116 U. S. 616 (1886), and later cases quoting its language.

In *Boyd*, appellants had been indicted under § 12 of an "Act to amend the customs revenue laws and to repeal moieties," for fraudulently attempting to deprive the United States of lawful customs duties payable on certain imported merchandise. According to the statute in question, a person found in violation of its provisions was to be "fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited." 116 U. S., at 617. Despite the pending indictment, appellants filed a claim for the goods held by the United States. In response, the prosecutor obtained an order of the District Court requiring appellants to produce the invoice covering the goods at issue. Appellants objected that such an order violated the Fourth and Fifth Amendments by subjecting them to an unreasonable search and seizure and by requiring them to act as witnesses against themselves.

This Court found the Fifth Amendment applicable, even though the action in question was one contesting the forfeiture

of certain goods. According to the Court: "We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Id.*, at 633–634. While at this point in its opinion, the Court seemed to limit its holding to proceedings involving the forfeiture of property, shortly after the quoted passage it broadened its reasoning in a manner that might seem to apply to the present case: "As, therefore, suits for *penalties and forfeitures* incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ." *Id.*, at 634 (emphasis added).

Seven years later, this Court relied primarily upon *Boyd* in holding that a proceeding resulting in a "forfeit and penalty" of $1,000 for violation of an Act prohibiting the employment of aliens was sufficiently criminal to trigger the protections of the Self-Incrimination Clause of the Fifth Amendment. *Lees* v. *United States*, 150 U. S. 476 (1893). More recently, in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965), and *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), this Court applied *Boyd* to proceedings involving the forfeiture of property for alleged criminal activity. *Plymouth Sedan* dealt with the applicability of the so-called exclusionary rule to a proceeding brought by the State of Pennsylvania to secure the forfeiture of a car allegedly involved in the illegal transportation of liquor. *Coin & Currency* involved the applicability of the Fifth Amendment privilege against compulsory self-incrimination in a proceeding brought by the United States to secure for-

feiture of $8,674 found in the possession of a gambler at the time of his arrest.

Read broadly, *Boyd* might control the present case. This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time." *Fisher* v. *United States*, 425 U. S. 391, 407 (1976). In *United States* v. *Regan*, 232 U. S. 37 (1914), for example, we declined to apply *Boyd*'s classification of penalties and forfeitures as criminal in a case where a defendant assessed with a $1,000 penalty for violation of the Alien Immigration Act claimed that he was entitled to have the Government prove its case beyond a reasonable doubt. *Boyd* and *Lees*, according to *Regan*, were limited in scope to the Fifth Amendment's guarantee against compulsory self-incrimination, which "is of broader scope than are the guarantees in Art. III and the Sixth Amendment governing trials and criminal prosecutions." 232 U. S., at 50. See also *Helvering* v. *Mitchell*, 303 U. S., at 400, n. 3. Similarly, in *Hepner* v. *United States*, 213 U. S. 103 (1909), this Court upheld the entry of a directed verdict against the appellant under a statute similar to that examined in *Lees*. According to *Hepner*, "the *Lees* and *Boyd cases* do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." *Id.*, at 112.

The question before us, then, is whether the penalty imposed in this case, although clearly not "criminal" enough to trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions, is nevertheless "so far criminal in [its] nature"

as to trigger the Self-Incrimination Clause of the Fifth Amendment. Initially, we note that the penalty and proceeding considered in *Boyd* were quite different from those considered in this case. *Boyd* dealt with forfeiture of property, a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law. See also *Lees* v. *United States, supra* (fixed monetary penalty); *One 1958 Plymouth Sedan* v. *Pennsylvania, supra* (forfeiture); *United States* v. *United States Coin & Currency, supra* (forfeiture). Here the penalty is much more analogous to traditional civil damages. Moreover, the statute under scrutiny in *Boyd* listed forfeiture along with fine and imprisonment as one possible punishment for customs fraud, a fact of some significance to the *Boyd* Court. See 116 U. S., at 634. Here, as previously stated, the civil remedy and the criminal remedy are contained in separate statutes enacted 70 years apart. The proceedings in *Boyd* also posed a danger that the appellants would prejudice themselves in respect to later criminal proceedings. See *Hepner* v. *United States, supra*, at 112. Here, respondent is protected by § 311 (b)(5), which expressly provides that "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except [for] prosecution for perjury or for giving a false statement." 33 U. S. C. § 1321 (b)(5).

More importantly, however, we believe that in the light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous to hold that § 311 (b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. We do not read *Boyd* as requiring a contrary conclusion.

IV

We conclude that the penalty imposed by Congress was civil, and that the proceeding in which it was imposed was not "quasi-criminal" as that term is used in *Boyd* v. *United States, supra.* The judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I agree with the Court that a proceeding for assessment of a monetary penalty under § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), is not a "criminal case" within the meaning of the Fifth Amendment. I reach this conclusion, however, for a number of reasons in addition to those discussed in the Court's opinion.

The Court of Appeals engaged in a careful analysis of the standards set forth in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963), for distinguishing civil from criminal proceedings. These standards are cataloged in a footnote of the Court's opinion. *Ante,* at 247–248, n. 7. The Court of Appeals concluded that some of the seven stated factors offered little guidance in this case, while others supported a "criminal" designation. In particular, it found that scienter played a part in determining the amount of penalty assessments; that the penalties promote traditional retributive aims of punishment; that behavior giving rise to the assessment is subject to criminal punishment under § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 407; and that the criteria employed by the Coast Guard to set the amount of assessments permit penalties that may be excessive in relation to alternative remedial or nonpunitive purposes. *Ward* v. *Coleman,* 598 F. 2d 1187, 1192–1194 (CA10 1979). The Court is content to discuss only one of

these findings. See *ante*, at 249–250. Because of the consideration given the others by the Court of Appeals, I think they deserve brief discussion, too.

My analysis of these other factors differs from that of the Court of Appeals in two principal respects. First, I do not agree with that court's apparent conclusion that none of the *Mendoza-Martinez* factors strongly supports a "civil" designation for a penalty proceeding under § 311 (b)(6). I conclude that imposition of a monetary penalty under this statute does not result in the imposition of an "affirmative disability or restraint" within the meaning of *Mendoza-Martinez*, 372 U. S., at 168; that monetary assessments are traditionally a form of civil remedy; and that, as the Court of Appeals conceded, 598 F. 2d., at 1193, § 311 (b)(6) serves remedial purposes dissociated from punishment. Although any one of these considerations by itself might not weigh heavily in favor of a "civil" designation, I think that cumulatively they point significantly in that direction.

Second, I would assign less weight to the role of scienter, the promotion of penal objectives, and the potential excessiveness of fines than did the Court of Appeals. *Mendoza-Martinez* suggested that a sanction that "comes into play *only* on a finding of *scienter*" might be indicative of a criminal proceeding. 372 U. S., at 168 (first emphasis added). Plainly, that is not the case here. Scienter is not mentioned on the face of the statute, and it is only one of many factors relevant to determination of an assessment under Coast Guard Commandant Instruction 5922.11B (Oct. 10, 1974). Furthermore, although the fines conceivably could be used to promote primarily deterrent or retributive ends, the fact that collected assessments are deposited in a revolving fund used to defray the expense of cleanup operations is a strong indicator of the pervasively civil and compensatory thrust of the statutory scheme. See § 311 (k), 33 U. S. C. § 1321 (k). Finally, while some of the factors employed by the Coast Guard to set

the amount of assessments undoubtedly could be used to exact excessive penalties, others are expressly related to the cost of cleanup and other remedial considerations. In the absence of evidence that excessive penalties actually have been assessed, I would be inclined to regard their likelihood as remote.

For these reasons, I agree with the Court that only the fifth *Mendoza-Martinez* factor, "whether the behavior to which [the sanction] applies is already a crime," 372 U. S., at 168, supports the respondent. Since I feel that this factor alone does not mandate characterization of the proceeding as "criminal" for purposes of the Fifth Amendment, particularly when other factors weigh in the opposite direction, I concur in the judgment.

MR. JUSTICE STEVENS, dissenting.

There are a host of situations in which the Government requires the citizen to provide it with information that may later be useful in proving that the citizen has some liability to the Government. In determining whether the combination of compulsion and liability is consistent with the Fifth Amendment, I would look to two factors: first, whether the liability actually imposed on the citizen is properly characterized as "criminal" and second, if so, whether the compulsion of information was designed to assist the Government in imposing such a penalty rather than furthering some other valid regulatory purpose.

Although this case is admittedly a close one, I am persuaded that the monetary penalty imposed on respondent pursuant to § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), was a "criminal" sanction for purposes of the Fifth Amendment protection against compelled self-incrimination. As the Court of Appeals pointed out, penalties under § 311 (b)(6) are not calculated to reimburse the Government for the cost of cleaning up an

oil spill.[1] Rather, this part of the statute is clearly aimed at exacting retribution for causing the spill:

> "The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the 'imposition or amount of a civil penalty.'" *Ward* v. *Coleman*, 598 F. 2d 1187, 1193 (CA10 1979).

I agree with the Court of Appeals that, under these circumstances, application of the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, leads to the conclusion that the penalty is a criminal sanction rather than a purely regulatory measure.

That is not the end of the inquiry, however. A reporting requirement is not necessarily invalid simply because it may incriminate a few of the many people to whom it applies. Two examples from the tax field will illustrate my point. As this Court held in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, statutes that are plainly designed to obtain information from a limited class of persons engaged in criminal activity in order to facilitate their prosecution and conviction are invalid under the Fifth Amendment. On the other hand, when the general income tax laws require a full reporting of each taxpayer's income in order to fulfill the Government's regulatory objectives, the fact that a particular answer may incriminate a particular taxpayer is not a sufficient excuse for refusing to

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[1] An owner or operator is liable for cleanup costs or, in the event that the discharge is "nonremovable," for liquidated damages under 33 U. S. C. § 1321 (b)(2)(B)(i) and § 1321 (f). As the Court of Appeals noted, payment of these damages does not relieve the owner or operator of liability for civil penalties under § 311 (b)(6). *Ward* v. *Coleman*, 598 F. 2d 1187, 1191 (CA10 1978).

supply the relevant information required from every taxpayer. See *United States* v. *Oliver*, 505 F. 2d 301, 307–308 (CA7 1974).[2]

Thus, given that the statutory penalty in this case is a criminal sanction, the issue becomes what the primary purpose of requiring the citizen to report oil spills is. If it is to simplify the assessment and collection of penalties from those responsible, it should fall within the reasoning of *Marchetti* and *Grosso*. On the other hand, if the requirement is merely to assist the Government in its cleanup responsibilities and

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[2] As I suggested in *Oliver*:

"The enactment of special legislation designed to procure incriminating disclosures from a select group of persons engaged in criminal conduct was tantamount to an accusation commencing criminal proceedings against them. The statutory demand to register as a gambler was comparable to the inquisitor's demand that a suspect in custody admit his guilt. The admission, once made, would almost inevitably become a part of the record of a criminal proceeding against a person who had already been accused when he confessed. Just as the *Miranda* decision may be read as having enlarged the adversary proceeding to commence when the accused is first taken into custody, *Marchetti* and comparable cases have, for Fifth Amendment purposes, treated special statutes designed to secure incriminating information from inherently suspect classes of persons as the commencement of criminal proceedings against those from whom incriminating information is demanded. Under this analysis, we must test the applicability of the Fifth Amendment to a self-reporting statute at the time that disclosure is compelled.

"The statute which defendant Oliver is accused of violating is applicable to the public at large, and its demands for information are neutral in the sense that they apply evenly to the few who have illegal earnings and the many who do not. The self-reporting requirements of the Internal Revenue Code are justified by acceptable reasons of policy, entirely unrelated to any purpose to obtain incriminating evidence against an accused person or group. Therefore, even though the disclosure of defendant's illegal income was compelled by statute, and even though we assume that such disclosure might well have been incriminating, the *Marchetti* holding does not justify the conclusion that the Fifth Amendment excuses defendant's obligation to report his entire income." (Footnotes omitted.) 505 F. 2d, at 307–308.

in its efforts to monitor the conditions of the Nation's waterways, it should be permissible. Although the question is again a close one, the automatic nature of the statutory penalty, which *must* be assessed in each and every case, convinces me that the reporting requirement is a form of compelled self-incrimination.[3] I therefore respectfully dissent.

[3] As a result, I would hold that the Government could not use a report filed by an individual owner or operator in assessing a civil penalty under § 311 (b)(6). However, I believe the Government could still use such a report in assessing damages under either § 311 (b)(2)(B)(i) or § 311 (f), see n. 1, *supra*, since penalties assessed under those subsections are regulatory rather than punitive in character.

Syllabus

THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79–116. Argued March 19, 1980—Decided June 27, 1980

Petitioner, a resident of the District of Columbia, received an award of disability benefits from the Virginia Industrial Commission under the Virginia Workmen's Compensation Act for injuries received in Virginia while employed by respondent employer (hereafter respondent), which was principally located in the District of Columbia, where petitioner was hired. Subsequently, petitioner received a supplemental award under the District of Columbia Workmen's Compensation Act over respondent's contention that since, as a matter of Virginia law, the Virginia award excluded any other recovery "at common law or otherwise" on account of the injury in Virginia, the District of Columbia's obligation to give that award full faith and credit precluded a second, supplemental award in the District. The administrative order upholding the supplemental award was reversed by the Court of Appeals, which held that the award was precluded by the Full Faith and Credit Clause.

Held: The judgment is reversed, and the case is remanded. Pp. 266–286; 286–290.

598 F. 2d 617, reversed and remanded.

MR. JUSTICE STEVENS, joined by MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that the Full Faith and Credit Clause does not preclude successive workmen's compensation awards, since a State has no legitimate interest within the context of the federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power, as here, to apply its workmen's compensation law in the first instance. Pp. 266–286.

(a) The rule of *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622, authorizing a State, by drafting or construing its workmen's compensation statute in "unmistakable language," directly to preclude a compensation award in another State, represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions. To vest the power of determining such extraterritorial effect in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV to prevent. A re-examination of *McCartin*'s "unmistakable language"

test reinforces the conclusion that it does not provide an acceptable basis on which to distinguish *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, wherein it was held that the Full Faith and Credit Clause precluded an employee, who received a workmen's compensation award for injuries received in one State, from seeking supplementary compensation in another State where he had been hired. Pp. 266–272.

(b) In view, however, of the history of subsequent state cases showing that they overwhelmingly followed *McCartin* and applied the "unmistakable language" test in permitting successive workmen's compensation awards, the principal values underlying the doctrine of *stare decisis* would not be served by attempting either to revive *Magnolia* or to preserve the coexistence of *Magnolia* and *McCartin*. The latter attempt could only breed uncertainty and unpredictability, since the application of the "unmistakable language" rule necessarily depends on a determination by one state tribunal of the effect to be given to statutory language enacted by the legislature of a different State. And the former would represent a change that would not promote stability in the law. Moreover, since *Magnolia* has been so rarely followed, there is little danger that there has been any significant reliance on its rule. Hence, a fresh examination of the full faith and credit issue is appropriate. Pp. 272–277.

(c) Since petitioner could have sought a compensation award in the first instance in either Virginia or the District of Columbia even if one statute or the other purported to confer an exclusive remedy, respondent and its insurer, for all practical purposes, would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes. It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance. Moreover, the state interest in providing adequate compensation to the injured worker would be fully served by the allowance of successive awards. Pp. 277–280.

(d) With respect to whether Virginia's interest in the integrity of its tribunal's determinations precludes a supplemental award in the District of Columbia, the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority foreclose the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards. The Virginia Industrial Commission, although it could establish petitioner's rights under Virginia law, neither could nor purported to determine his rights under District of Columbia law. Full faith and credit must be given to the determination that the Commission had the authority to make but need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to

pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights. While Virginia had an interest in having respondent pay petitioner the amounts specified in its award, allowing a supplementary recovery in the District of Columbia does not conflict with that interest. And whether or not petitioner sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers—interests that a court of general jurisdiction might consider, but which must be ignored by the Virginia Industrial Commission. Pp. 280–285.

MR. JUSTICE WHITE, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE POWELL, concluded that the Virginia Workmen's Compensation Act lacks the "unmistakable language" which *McCartin, supra,* requires if a workmen's compensation award is to preclude a subsequent award in another State. Pp. 289–290.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BRENNAN, STEWART, and BLACKMUN, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL, J., joined, *post,* p. 286. REHNQUIST, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 290.

James F. Green argued the cause for petitioner. With him on the briefs were *Martin E. Gerel, James A. Mannino,* and *Mark L. Schaffer.*

Kevin J. Baldwin argued the cause for respondent Washington Gas Light Co. With him on the brief were *Lewis Carroll, Carl W. Belcher, Henry F. Krautwurst,* and *Douglas V. Pope. Alan I. Horowitz* argued the cause *pro hac vice* for the federal respondent. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Laurie M. Streeter,* and *Joshua T. Gillelan II.*

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN joined.

Petitioner received an award of disability benefits under the Virginia Workmen's Compensation Act. The question

presented is whether the obligation of the District of Columbia to give full faith and credit to that award [1] bars a supplemental award under the District's Workmen's Compensation Act.[2]

Petitioner is a resident of the District of Columbia and was hired in the District of Columbia. During the year that he was employed by respondent, he worked primarily in the District but also worked in Virginia and Maryland. He sustained a back injury while at work in Arlington, Va., on January 22, 1971. Two weeks later he entered into an "Industrial Commission of Virginia Memorandum of Agreement as to Payment of Compensation" providing for benefits of $62 per week. Several weeks later the Virginia Industrial Commission approved the agreement and issued its award directing that payments continue "during incapacity," subject to various contingencies and changes set forth in the Virginia statute. App. 49.

In 1974, petitioner notified the Department of Labor of his

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[1] United States Constitution, Art. IV, § 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 28 U. S. C. § 1738 provides, in part:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

. . . . .

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

[2] The District of Columbia Workmen's Compensation Act, D. C. Code §§ 501–502 (1968), adopts the terms of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 901 *et seq.* The program is administered by the United States Department of Labor.

intention to seek compensation under the District of Columbia Act. Respondent opposed the claim primarily [3] on the ground that since, as a matter of Virginia law, the Virginia award excluded any other recovery "at common law or otherwise" on account of the injury in Virginia,[4] the District of Columbia's obligation to give that award full faith and credit precluded a second, supplemental award in the District.

The Administrative Law Judge agreed with respondent that the Virginia award must be given res judicata effect in the District to the extent that it was res judicata in Virginia.[5] He held, however, that the Virginia award, by its terms, did not preclude a further award of compensation in Virginia.[6]

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[3] Respondent also contended that the claim was barred by limitations. The Administrative Law Judge ruled, however, that respondent's failure to file the report of injury required by the District of Columbia Act had tolled the statute and made respondent automatically liable for a 10% penalty. Respondent also argues in this Court that the LHWCA forbade the granting of an award where compensation could have been obtained under a state workmen's compensation program. Since the Court of Appeals passed on neither of these statutory arguments, they remain open on remand.

[4] Virginia Code § 65.1–40 (1980) provides:

"Employee's rights under Act exclude all others.—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

[5] "Accordingly, it is concluded that, in the instant matter, Claimant's award under the Virginia compensation law must be given such faith and credit in the District as it is given in Virginia; that, to the extent that the Virginia award is *res judicata* in Virginia, it is *res judicata* in the District." App. 42.

[6] "The award did not effect a final settlement of the rights and liabilities of the parties. Rather, by its terms, it contemplated further awards.

. . . . . .

"In view of the foregoing, it is determined that, because the Virginia award was not a bar to further recovery of compensation in Virginia, it

Moreover, he construed the statutory prohibition against additional recovery "at common law or otherwise" as merely covering "common law and other remedies under Virginia law." [7] After the taking of medical evidence, petitioner was awarded permanent total disability benefits payable from the date of his injury with a credit for the amounts previously paid under the Virginia award. *Id.*, at 31.

The Benefits Review Board upheld the award. 9 BRBS 760 (1978). Its order, however, was reversed by the United States Court of Appeals for the Fourth Circuit, judgment order reported at 598 F. 2d 617,[8] which squarely held that a "second and separate proceeding in another jurisdiction upon the same injury after a prior recovery in another State [is] precluded by the Full Faith and Credit Clause." [9] We granted certiorari, 444 U. S. 962, and now reverse.

I

Respondent contends that the District of Columbia was without power to award petitioner additional compensation because of the Full Faith and Credit Clause of the Constitution or, more precisely, because of the federal statute implementing that Clause.[10] An analysis of this contention must

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was not, under the full faith and credit concept, *res judicata* as a bar to further recovery of compensation under District law." *Id.*, at 46–47.

[7] *Id.*, at 48. He added that the exclusive-remedy provisions "were not designed for extraterritorial extension to other sovereign jurisdictions. They do not preclude jurisdiction under District law." *Ibid.*

[8] See 33 U. S. C. § 921 (c), which provides for review of decisions of the Benefits Review Board "in the United States court of appeals for the circuit in which the injury occurred. . . ."

[9] The quoted language is from the Fourth Circuit's opinion in the similar case of *Pettus* v. *American Airlines, Inc.*, 587 F. 2d 627, 630 (1978), cert. denied, 444 U. S. 883. In this case the Court of Appeals merely issued a brief unpublished order citing *Pettus*. App. 2a.

[10] The statute places on courts in the District of Columbia the same obligation to respect state judgments as is imposed on the courts of the several States. See n. 1, *supra*.

begin with two decisions from the 1940's that are almost directly on point: *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, and *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622.

In *Magnolia*, a case relied on heavily both by respondent and the Court of Appeals, the employer hired a Louisiana worker in Louisiana. The employee was later injured during the course of his employment in Texas. A tenuous majority [11] held that Louisiana was not permitted to award the injured worker supplementary compensation under the Louisiana Act after he had already obtained a recovery from the Texas Industrial Accident Board:

> "Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause

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[11] Four Members of the Court—Justices Black, Douglas, Murphy, and Rutledge—dissented, expressing the opinion that the holding was not supported by precedent and did not accord proper respect to the States' interests in implementing their policies of compensating injured workmen.

Mr. Justice Jackson concurred in Mr. Chief Justice Stone's opinion for the Court, but only because he felt bound by *Williams* v. *North Carolina*, 317 U. S. 287, a decision from which he vigorously dissented. *Id.*, at 311. In that case, the Court held that North Carolina had to respect an *ex parte* divorce decree obtained in Nevada in a bigamy prosecution of a North Carolina resident. (It was assumed for purposes of decision that the petitioner was a bona fide domiciliary of Nevada at the time of the divorce, *id.*, at 302.) In his concurring opinion in *Magnolia*, Mr. Justice Jackson explained that he was "unable to see how Louisiana can be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada." 320 U. S., at 446.

Mr. Justice Douglas, author of the opinion for the Court in *Williams*, pointed out, in one of the two dissents filed in the *Magnolia* case, that as compared with the dual workmen's compensation award problem then before the Court, "questions of status, *i. e.*, marital capacity, involve conflicts between the policies of two States which are quite irreconcilable." 320 U. S., at 447.

precludes him from again seeking a remedy in Louisiana upon the same grounds." 320 U. S., at 444.

Little more than three years later, the Court severely curtailed the impact of *Magnolia*. In *McCartin*, the employer and the worker both resided in Illinois and entered into an employment contract there for work to be performed in Wisconsin. The employee was injured in the course of that employment. He initially filed a claim with the Industrial Commission of Wisconsin. Prior to this Court's decision in *Magnolia*, the Wisconsin Commission informed him that under Wisconsin law, he could proceed under the Illinois Workmen's Compensation Act, and then claim compensation under the Wisconsin Act, with credit to be given for any payments made under the Illinois Act. Thereafter, the employer and the employee executed a contract for payment of a specific sum in full settlement of the employee's right under Illinois law. The contract expressly provided, however, that it would "'not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin.'" 330 U. S., at 624. The employee then obtained a supplemental award from the Wisconsin Industrial Commission; but the Wisconsin state courts vacated it under felt compulsion of the intervening decision in *Magnolia*.

This Court reversed, holding without dissent[12] that *Magnolia* was not controlling. Although the Court could have relied exclusively on the contract provision reserving the employee's rights under Wisconsin law to distinguish the case from *Magnolia*, Mr. Justice Murphy's opinion provided a significantly different ground for the Court's holding when it said:

"[T]he reservation spells out what we believe to be implicit in [the Illinois Workmen's Compensation] Act—namely, that an . . . award of the type here involved does not foreclose an additional award under the laws of

[12] Mr. Justice Rutledge concurred only in the result.

> another state. And in the setting of this case, that fact is of decisive significance." 330 U. S., at 630.

Earlier in the opinion, the Court had stated that "[o]nly some unmistakable language by a state legislature or judiciary would warrant our accepting . . . a construction" that a workmen's compensation statute "is designed to preclude any recovery by proceedings brought in another state." *Id.*, at 627–628. The Illinois statute, which the Court held not to contain the "unmistakable language" required to preclude a supplemental award in Wisconsin, broadly provided:

> "'No common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe, other than the compensation herein provided, shall be available to any employe who is covered by the provisions of this act, . . .'" *Id.*, at 627.

The Virginia Workmen's Compensation Act's exclusive-remedy provision, see n. 4, *supra*, is not exactly the same as Illinois'; but it contains no "unmistakable language" directed at precluding a supplemental compensation award in another State that was not also in the Illinois Act. Consequently, *McCartin* by its terms, rather than the earlier *Magnolia* decision, is controlling as between the two precedents. Nevertheless, the fact that we find ourselves comparing the language of two state statutes, neither of which has been construed by the highest court of either State, in an attempt to resolve an issue arising under the Full Faith and Credit Clause makes us pause to inquire whether there is a fundamental flaw in our analysis of this federal question.

II

We cannot fail to observe that, in the Court's haste to retreat from *Magnolia*,[13] it fashioned a rule that clashes with

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[13] *Magnolia* had not been well received. See Cheatham, Res Judicata

normally accepted full faith and credit principles. It has long been the law that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced." *Hampton* v. *McConnel*, 3 Wheat. 234, 235 (Marshall, C. J.,). See also *Mills* v. *Duryee*, 7 Cranch 481, 484 (Story, J.). This rule, if not compelled by the Full Faith and Credit Clause itself, see n. 18, *infra*, is surely required by 28 U. S. C. § 1738, which provides that the "Acts, records and judicial proceedings . . . [of any State] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken." See n. 1, *supra*.[14] Thus, in effect, by virtue of the full faith and credit obligations of the several States, a State is permitted to determine the extraterritorial effect of its judgments; but it may only do so indirectly, by prescribing the effect of its judgments within the State.

The *McCartin* rule, however, focusing as it does on the extraterritorial intent of the rendering State, is fundamentally different. It authorizes a State, by drafting or construing its legislation in "unmistakable language," directly to determine the extraterritorial effect of its workmen's compensation awards. An authorization to a state legislature of this character is inconsistent with the rule established in *Pacific Em-*

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and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt, 44 Colum. L. Rev. 330, 344–346 (1944) (hereinafter Cheatham); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1227–1230 (1946) (hereinafter Freund); Wolkin, Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?, 92 U. Pa. L. Rev. 401, 405–411 (1944) (hereinafter Wolkin); Note, 23 Ind. L. J. 214 (1948); Note, 18 Tulane L. Rev. 509 (1944); Recent Cases, 12 Geo. Wash. L. Rev. 487 (1944).

[14] That statute, insofar as it is relevant here, reads exactly as it did when the first Congress passed it in 1790. See 1 Stat. 122.

ployers Ins. Co. v. *Industrial Accident Comm'n*, 306 U. S. 493, 502:

> "This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

It follows inescapably that the *McCartin* "unmistakable language" rule represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions.[15] The Full Faith and

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[15] See *Magnolia*, 320 U. S., at 438; *Williams v. North Carolina*, 317 U. S., at 302; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547; Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 161–162 (1949) (hereinafter Reese & Johnson):

"Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise 'independent, sovereign states.' Hence it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment. In this regard, it is interesting to note that in dealing with full faith and credit to statutes the Supreme Court in recent years has accorded no weight to language which purported to give a particular statute extraterritorial effect.[49] There is every reason why a similar attitude should be taken with respect to judgments.

. . . . . .

"[49] Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493 (1939); Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532 (1935); Tennessee Coal Iron & R. R. Co. v. George, 233 U. S. 354 (1914); Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55 (1909). . . ." (Some footnotes omitted.)

In *Tennessee Coal, Iron & R. Co.* v. *George*, cited in the authors' footnote, the Court held that a Georgia court, consistent with its full faith and credit obligations, could ignore a provision in the Alabama statute creating the cause of action there sued upon, which required that any suit to enforce the right of action "must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." 233 U. S., at 358. The *Sowers* case is much like the *George* case. *Pacific Employers* and *Alaska Packers* are discussed in Part IV, *infra*.

Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer* v. *Sherrer*, 334 U. S. 343, 355. To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent. See *Nevada* v. *Hall*, 440 U. S. 410, 424–425.[16]

Thus, a re-examination of *McCartin*'s "unmistakable language" test reinforces our tentative conclusion that it does not provide an acceptable basis on which to distinguish *Magnolia*. But if we reject that test, we must decide whether to overrule either *Magnolia* or *McCartin*. In making this kind of decision, we must take into account both the practical values served by the doctrine of *stare decisis* and the principles that inform the Full Faith and Credit Clause.

III

The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication;[17] it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.[18]

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[16] Cf. Note, Unconstitutional Discrimination in Choice of Law, 77 Colum. L. Rev. 272 (1977) (Privileges and Immunities Clause).

[17] "[I]mitation of the past, until we have a clear reason for a change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want." O. Holmes, Collected Legal Papers 290 (1920).

[18] The doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because "correction through

It is therefore appropriate to begin the inquiry by considering whether a rule that permits, or a rule that forecloses, successive workmen's compensation awards is more consistent with settled practice. The answer to this question is pellucidly clear.

It should first be noted that *Magnolia*, by only the slimmest majority, see n. 11, *supra*, effected a dramatic change in the law that had previously prevailed throughout the United States. See Mr. Justice Black's dissent in *Magnolia*, 320 U. S.,

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legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407–408 (Brandeis, J., dissenting). See *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 627 (POWELL, J., concurring).

The full faith and credit area presents special problems, because the Constitution expressly delegates to Congress the authority "by general Laws [to] prescribe the Manner in which [the States'] Acts, Records and Proceedings shall be proved, *and the Effect thereof*." (Emphasis added.) See n. 1, *supra*. Yet it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation. See *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, in which the Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job-related injuries where the employment relation was formed in Vermont, even though the injury occurred in New Hampshire. At the time the *Clapper* case was decided, the predecessor of 28 U. S. C. § 1738 included no reference to "Acts" in the sentence that required the forum State to accord the same full faith and credit to records and judicial proceedings as they have in the State from which they are taken. The reference to Acts was added for the first time in 1948. See *Carroll* v. *Lanza*, 349 U. S. 408, 422, n. 4 (Frankfurter, J., dissenting). Thus, the *Clapper* case rested on the constitutional Clause alone. *Carroll*, which for all intents and purposes buried whatever was left of *Clapper* after *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493; see 349 U. S., at 412; n. 23, *infra*, cast no doubt on *Clapper's* reliance on the Full Faith and Credit Clause itself.

Thus, while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court. See Freund 1229–1230.

at 457–459, 462.[19] Of greater importance is the fact that as a practical matter the "unmistakable language" rule of construction announced in *McCartin* left only the narrowest area in which *Magnolia* could have any further precedential value. For the exclusivity language in the Illinois Act construed in *McCartin* was typical of most state workmen's compensation laws. Consequently, it was immediately recognized that *Magnolia* no longer had any significant practical impact.[20] Moreover, since a state legislature seldom focuses on the

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[19] Professor Larson has pointed out that prior to *Magnolia* and *McCartin*, "state courts, with virtual unanimity, had held or assumed that a prior award under the laws of another state was no bar to an award under local law made in accordance with the local law's own standards of applicability, always of course, with the understanding that the claimant could not have a complete double recovery but must deduct from its present recovery the amount of the prior award." 4 A. Larson, Workmen's Compensation Law § 85.10, pp. 16–15—16–16 (1980) (footnote omitted) (hereinafter A. Larson). See also Wolkin 403, n. 6.

As the majority opinion in *Magnolia* recognized, 320 U. S., at 441, n. 5, the American Law Institute's Restatement of Conflict of Laws § 403 (1934) was flatly contrary to the *Magnolia* result: "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award." As we note below, see n. 21, *infra*, Texas' rule was otherwise.

[20] Virtually every commentator agrees that *McCartin* all but overruled *Magnolia*. See R. Leflar, American Conflicts Law § 162, p. 334 (3d ed. 1977); G. Stumberg, Principles of Conflict of Laws 221 (3d ed. 1963); 4 A. Larson §§ 85.10, 85.20, at 15–16, 16–17; Reese & Johnson 159 ("The dissenters in *Magnolia* saw their day of triumph in . . . *McCartin*. . . . [T]he facts were essentially identical with those of the *Magnolia* case; similarly, the workmen's compensation statutes involved in the two cases were not in any significant manner distinguishable"). See also Recent Cases, 60 Harv. L. Rev. 993, 993–994 (1947) ("By this decision the practical effect of the *Magnolia* case in preventing more than one state applying its workmen's compensation law to the same injury is almost completely nullified . . . , and may foreshadow a modification of 'full faith and credit' as to workmen's compensation judgments similar to that which occurred in regard to legislation"); Comment, 33 Cornell L. Q. 310, 315 (1947).

extraterritorial effect of its enactments,[21] and since a state court has even less occasion to consider whether an award under its State's law is intended to preclude a supplemental award under another State's Workmen's Compensation Act, the probability that any State would thereafter announce a new rule against supplemental awards in other States was extremely remote. As a matter of fact, subsequent cases in the state courts have overwhelmingly followed *McCartin* and permitted successive state workmen's compensation awards.[22]

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[21] Apparently only Nevada's Workmen's Compensation Act contains the unmistakable language required under the *McCartin* rule. Nevada Rev. Stat. § 616.525 (1979) provides in part:

"[I]f an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside this state, and he . . . accepts any compensation or benefits under the provisions of this chapter, the acceptance of such compensation shall constitute a waiver by such employee . . . of all rights and remedies against the employer at common law *or given under the laws of any other state*, and shall further constitute a full and complete release of such employer from any and all liability arising from such injury. . . ." (Emphasis added.)

In *Magnolia*, the Court noted the existence of a Texas statute precluding a supplemental award in Texas when an injured worker had obtained an award under the workmen's compensation law of another State. 320 U. S., at 435. But that provision, of course, was directed not at the effect Texas desired a Texas award to be given in a second State, but rather at the converse situation. That is, it governed the effect that the Texas Industrial Accident Board had to give to an award previously rendered in another State. See *id.*, at 454 (Black, J., dissenting). While the Texas statute so understood may be obliquely probative of the Texas Legislature's intent as regards the effect to be given a Texas award in another State, that intent is surely not indicated with the unmistakable language required by *McCartin*.

It is worth noting that the Virginia statute involved in this case expressly allows a second recovery in Virginia in certain cases in which a prior recovery has been obtained in another State. Va. Code § 65.1–61 (1980).

[22] See, *e. g.*, *City Products Corp.* v. *Industrial Comm'n*, 19 Ariz. App. 286, 506 P. 2d 1071 (1973) (prior California award); *Jordan* v. *Industrial*

Thus, all that really remained of *Magnolia* after *McCartin* was a largely theoretical difference between what the Court described as "unmistakable language" and the broad language

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Comm'n, 117 Ariz. 215, 571 P. 2d 712 (App. 1977) (prior Texas award); *McGehee Hatchery Co.* v. *Gunter*, 234 Ark. 113, 350 S. W. 2d 608 (1961) (prior Mississippi award); *Reynolds Electrical & Engineering Co., Inc.* v. *Workmen's Compensation Appeals Bd.*, 65 Cal. 2d 429, 421 P. 2d 96 (1966) (prior Nevada award); *Industrial Track Builders of America* v. *Lemaster*, 429 S. W. 2d 403 (Ky. 1968) (prior Indiana award); *Ryder* v. *Insurance Co. of North America*, 282 So. 2d 771 (La. App. 1973) (prior Georgia award); *Griffin* v. *Universal Underwriters Ins. Co.*, 283 So. 2d 748 (La. 1973) (prior Texas award under statute involved in *Magnolia* held not to preclude second award in Louisiana in light of *McCartin*), cert. denied, 416 U. S. 904; *Lavoie's Case*, 334 Mass. 403, 135 N. E. 2d 750 (1956) (prior Rhode Island award), cert. denied, 352 U. S. 927; *Stanley* v. *Hinchliffe & Kenner*, 395 Mich. 645, 652–653, 238 N. W. 2d 13, 16 (1976) (prior California award) ("It is now widely accepted that *McCartin* severely limited, if not overruled, Magnolia . . ."); *Cook* v. *Minneapolis Bridge Construction Co.*, 231 Minn. 433, 43 N. W. 2d 792 (1950) (prior North Dakota award); *Hubbard* v. *Midland Constructors, Inc.*, 269 Minn. 425, 426, n. 1, 131 N. W. 2d 209, 211, n. 1 (1964) (prior South Dakota award); *Harrison Co.* v. *Norton*, 244 Miss. 752, 146 So. 2d 327 (1962) (prior Georgia award); *Bowers* v. *American Bridge Co.*, 43 N. J. Super. 48, 127 A. 2d 580 (1956), aff'd, 24 N. J. 390, 132 A. 2d 28 (1957) (prior Pennsylvania award); *Hudson* v. *Kingston Contracting Co.*, 58 N. J. Super. 455, 156 A. 2d 491 (1959) (prior Maryland award); *Cramer* v. *State Concrete Corp.*, 39 N. J. 507, 189 A. 2d 213 (1963) (prior New York award); *Bekkedahl* v. *North Dakota Workmen's Compensation Bureau*, 222 N. W. 2d 841 (N. D. 1974) (prior Montana award); *Spietz* v. *Industrial Comm'n*, 251 Wis. 168, 28 N. W. 2d 354 (1947) (prior Montana award).

But see *Gasch* v. *Britton*, 92 U. S. App. D. C. 64, 202 F. 2d 356 (1953) (2-to-1 decision, Fahy, J., dissenting) (prior Maryland award held preclusive of supplemental award in District of Columbia as construction of Maryland law, which construction was specifically rejected by *Hudson*, *supra*, and, significantly, by the Maryland Court of Appeals in a declaratory judgment action, see *Wood* v. *Aetna Casualty & Surety Co.*, 260 Md. 651, 273 A. 2d 125 (1971)); *Cofer* v. *Industrial Comm'n*, 24 Ariz. App. 357, 359, n. 2, 538 P. 2d 1158, 1160, n. 2 (1975) (refusing to permit second award in Arizona after claimant obtained first award in Texas, under

of the exclusive-remedy provision in the Illinois Workmen's Compensation Act involved in *McCartin*.

This history indicates that the principal values underlying the doctrine of *stare decisis* would not be served either by attempting to revive *Magnolia* or by attempting to preserve the uneasy coexistence of *Magnolia* and *McCartin*. The latter attempt could only breed uncertainty and unpredictability, since the application of the "unmistakable language" rule of *McCartin* necessarily depends on a determination by one state tribunal of the effect to be given to statutory language enacted by the legislature of a different State. And the former would represent a rather dramatic change that surely would not promote stability in the law. Moreover, since *Magnolia* has been so rarely followed, there appears to be little danger that there has been any significant reliance on its rule. We conclude that a fresh examination of the full faith and credit issue is therefore entirely appropriate.

IV

Three different state interests are affected by the potential conflict between Virginia and the District of Columbia. Virginia has a valid interest in placing a limit on the potential liability of companies that transact business within its borders. Both jurisdictions have a valid interest in the welfare of the injured employee—Virginia because the injury occurred within that State, and the District because the injured party was employed and resided there. And finally, Virginia has an interest in having the integrity of its formal determinations of contested issues respected by other sovereigns.

The conflict between the first two interests was resolved in *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, and a series of later cases. In *Alaska Packers*,

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compulsion of *Magnolia*, but questioning that case's interpretation of the Texas statute, see n. 21, *supra;* specifically repudiated by *Jordan, supra;* and see *Griffin, supra*).

California, the State where the employment contract was made, was allowed to apply its own workmen's compensation statute despite the statute of Alaska, the place where the injury occurred, which was said to afford the exclusive remedy for injuries occurring there. *Id.*, at 539. The Court held that the conflict between the statutes of two States ought not to be resolved "by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Id.*, at 547.

The converse situation was presented in *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493. In that case the injury occurred in California, and the objection to California's jurisdiction was based on a statute of Massachusetts, the State where the employee resided and where the employment contract had been made. The Massachusetts statute provided that the remedy afforded was exclusive of the worker's " 'right of action at common law or under the law of any other jurisdiction.' " *Id.*, at 498. Again, however, California was permitted to provide the employee with an award under the California statute.[23]

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[23] The Court reasoned:

"The Supreme Court of California has recognized the conflict and resolved it by holding that the full faith and credit clause does not deny to the courts of California the right to apply its own statute awarding compensation for an injury suffered by an employee within the state.

"To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy

The principle that the Full Faith and Credit Clause does not require a State to subordinate its own compensation policies to those of another State has been consistently applied in more recent cases. *Carroll* v. *Lanza*, 349 U. S. 408; *Crider* v. *Zurich Ins. Co.*, 380 U. S. 39; *Nevada* v. *Hall*, 440 U. S., at 421–424. Indeed, in the *Nevada* case the Court not only rejected the contention that California was required to respect a statutory limitation on the defendant's liability, but did so in a case in which the defendant was the sovereign State itself asserting, alternatively, an immunity from any liability in the courts of California.

It is thus perfectly clear that petitioner could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, *Carroll* v. *Lanza*, *supra*; *Pacific Employers*, *supra*,[24] or in the District of Columbia, where petitioner resided, his employer was principally located, and the employment relation was formed, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, *supra*. And as those cases underscore, compensation could have been sought under either

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which that state has provided. We cannot say that the full faith and credit clause goes so far.

"While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 306 U. S., at 501.

[24] In *Carroll*, the Court observed that "*Pacific Employers Insurance Co.* v. *Commission*, 306 U. S. 493, departed . . . from the [*Bradford Electric Co.* v.] *Clapper* decision." 349 U. S., at 412. See n. 18, *supra*. The Court's retreat from the rigid *Clapper* rule, which at the time appeared constitutionally to require application of the workmen's compensation law of the State in which the employment relation was centered, to the more flexible balancing of the respective States' interests in *Pacific Employers* parallels the Court's movement from *Magnolia* to *McCartin*.

compensation scheme even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event. It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance.

It is also manifest that the interest in providing adequate compensation to the injured worker would be fully served by the allowance of successive awards. In this respect the two jurisdictions share a common interest and there is no danger of significant conflict.

The ultimate issue, therefore, is whether Virginia's interest in the integrity of its tribunal's determinations forecloses a second proceeding to obtain a supplemental award in the District of Columbia. We return to the Court's prior resolution of this question in *Magnolia*.

The majority opinion in *Magnolia* took the position that the case called for a straightforward application of full faith and credit law: the worker's injury gave rise to a cause of action; relief was granted by the Texas Industrial Accident Board; that award precluded any further relief in Texas;[25] and further relief was therefore precluded elsewhere as well. The majority relied heavily on *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, for the propositions that a workmen's compensation award stands on the same footing as a court judgment, and that a compensation award under one State's law is a bar to a second award under another State's law. See 320 U. S., at 441, 446.

But *Schendel* did not compel the result in *Magnolia*. See 320 U. S., at 448 (Douglas, J., dissenting); *id.*, at 457 (Black, J., dissenting).[26] In *Schendel*, the Court held that an Iowa state

[25] Whether the latter was true as a matter of Texas law is open to question. See nn. 21, 22, *supra*.

[26] See also Wolkin 410.

compensation award, which was grounded in a contested factual finding that the deceased railroad employee was engaged in intrastate commerce, precluded a subsequent claim under the Federal Employers' Liability Act (FELA) brought in the Minnesota state courts, which would have required a finding that the employee was engaged in interstate commerce. *Schendel* therefore involved the unexceptionable full faith and credit principle that resolutions of factual matters underlying a judgment must be given the same res judicata effect in the forum State as they have in the rendering State. See *Durfee* v. *Duke*, 375 U. S. 106; *Sherrer* v. *Sherrer*, 334 U. S., at 351–352. The Minnesota courts could not have granted relief under the FELA and also respected the factual finding made in Iowa.[27]

In contrast, neither *Magnolia* nor this case concerns a second State's contrary resolution of a factual matter determined in the first State's proceedings. Unlike the situation in *Schendel*, which involved two mutually exclusive remedies, compensation could be obtained under either Virginia's or the District's workmen's compensation statutes on the basis of the same set of facts. A supplemental award gives full effect to the facts determined by the first award and also allows full credit for payments pursuant to the earlier award. There is neither inconsistency nor double recovery.

We are also persuaded that *Magnolia*'s reliance on *Schendel* for the proposition that workmen's compensation awards stand on the same footing as court judgments was unwarranted. To be sure, as was held in *Schendel*, the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court. But the critical differences between a court of general juris-

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[27] "The Iowa proceeding was brought and determined upon the theory that Hope [the deceased worker] was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same." 270 U. S., at 616.

diction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

A final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability. A traditional application of res judicata principles enables either party to claim the benefit of the judgment insofar as it resolved issues the court had jurisdiction to decide. Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Commission of Virginia does not have that power. Its jurisdiction is limited to questions arising under the Virginia Workmen's Compensation Act. See Va. Code § 65:1–92 (1980). Typically, a workmen's compensation tribunal may only apply its own State's law.[28] In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith

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[28] See 4 A. Larson § 86.40, at 16–44; Cheatham 344. The reason for this is the special nature of a workmen's compensation remedy. It is not merely a grant of a lump-sum award at the end of an extended adversary proceeding. See 4 A. Larson § 84.20, at 16–9:

"[A] highly developed compensation system does far more than that. It stays with the claimant from the moment of the accident to the time he is fully restored to normal earning capacity. This may involve supervising an ongoing rehabilitation program, perhaps changing or extending it, perhaps providing, repairing, and replacing prosthetic devices, and supplying vocational rehabilitation. Apart from rehabilitation, optimum compensation administration may require reopening of the award from time to time for change of condition or for other reasons. . . ."

Thus, a workmen's compensation remedy is potentially quite different from the application of a particular State's law to a transitory cause of action based on fault. See generally *New York Central R. Co.* v. *White*, 243 U. S. 188.

and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.[29] Since it was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.[30]

It is true, of course, that after Virginia entered its award, that State had an interest in preserving the integrity of what

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[29] Cf. Restatement (Second) of Judgments § 61.2 (c) (Tent. Draft No. 5, 1978):

"(1) When any of the following circumstances exists, the general rule of § 61 [under which a valid judgment extinguishes a claim by its merger in the judgment] does not apply to extinguish a claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

. . . . . .

"(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief. . . ."

[30] While Professor Larson points out that there are some isolated examples of workmen's compensation tribunals technically having the power to go beyond the confines of their own States' statutes, see 4 A. Larson § 84.30, at 16–13, he also notes that there is "no decisional law . . . showing how this can be done if the filing of a claim with a specified tribunal in the other State is a condition precedent to recovery. Indeed, Vermont [whose statute grants its commission the authority to permit the assertion of rights created under the Acts of other States] refused to use this express statutory power when asked to apply the compensation law of Massachusetts, saying that 'the remedy is an integral part of the right given and the latter has no existence separate and apart from the former.'" *Ibid.* See *Grenier* v. *Alta Crest Farms, Inc.*, 115 Vt. 324, 330, 58 A. 2d 884, 888 (1948). Accordingly, it would seem to follow that unless the tribunal actually passes on the injured worker's rights under another State's law, the worker would not be precluded from seeking a second award in that other State.

it had done. And it is squarely within the purpose of the Full Faith and Credit Clause, as explained in *Pacific Employers*, 306 U. S., at 501, "to preserve rights acquired or confirmed under the public acts" of Virginia by requiring other States to recognize their validity. See n. 23, *supra*. Thus, Virginia had an interest in having respondent pay petitioner the amounts specified in its award. Allowing a supplementary recovery in the District does not conflict with that interest.

As we have already noted, Virginia also has a separate interest in placing a ceiling on the potential liability of companies that transact business within the State. But past cases have established that that interest is not strong enough to prevent other States with overlapping jurisdiction over particular injuries from giving effect to their more generous compensation policies when the employee selects the most favorable forum in the first instance. Thus, the only situations in which the *Magnolia* rule would tend to serve that interest are those in which an injured workman has either been constrained by circumstances to seek relief in the less generous forum or has simply made an ill-advised choice of his first forum.

But in neither of those cases is there any reason to give extra weight to the first State's interest in placing a ceiling on the employer's liability than it otherwise would have had. For neither the first nor the second State has any overriding interest in requiring an injured employee to proceed with special caution when first asserting his claim. Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case. And indeed, it is not always the injured worker who institutes the claim. See *Schendel*, 270 U. S., at 614.[31] This informality

[31] See also Cheatham 345, and Wolkin 410, pointing out the potential for overreaching by an employer more knowledgeable than the injured em-

is consistent with the interests of both States. A rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement of benefits may be essential.

Thus, whether or not the worker has sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers—interests that a court of general jurisdiction might consider, but which must be ignored by the Virginia Industrial Commission. The reasons why the statutory policy of exclusivity of the other jurisdictions involved in *Alaska Packers* and *Pacific Employers*, could not defeat California's implementation of its own compensation policies therefore continue to apply even after the entry of a workmen's compensation award.

Of course, it is for each State to formulate its own policy whether to grant supplemental awards according to its perception of its own interests. We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause,[32] as was implicitly recognized at the time of *McCartin*.

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ployee about the relative benefits available under the applicable workmen's compensation schemes. See *Magnolia*, 320 U. S., at 450 (Black, J., dissenting):

"Confined to a hospital [the injured worker] was told that he could not recover compensation unless he signed two forms presented to him. As found by the Louisiana trial judge there was printed on each of the forms 'in small type' the designation 'Industrial Accident Board, Austin, Texas.'"

[32] Cf. *Yarborough* v. *Yarborough*, 290 U. S. 202, 227 (Stone, J., dissenting).

We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards. Accordingly, *Magnolia Petroleum Co.* v. *Hunt* should be overruled.

The judgment of the Court of Appeals is reversed, and the case is remanded.

So ordered.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed, but I am unable to join in the reasoning by which the plurality reaches that result. Although the plurality argues strenuously that the rule of today's decision is limited to awards by state workmen's compensation boards, it seems to me that the underlying rationale goes much further. If the employer had exercised its statutory right of appeal to the Supreme Court of Virginia and that Court upheld the award, I presume that the plurality's rationale would nevertheless permit a subsequent award in the District of Columbia. Otherwise, employers interested in cutting off the possibility of a subsequent award in another jurisdiction need only seek judicial review of the award in the first forum. But if such a judicial decision is not preclusive in the second forum, then it appears that the plurality's rationale is not limited in its effect to judgments of administrative tribunals.

The plurality contends that unlike courts of general jurisdiction, workmen's compensation tribunals generally have no power to apply the law of another State and thus cannot determine the rights of the parties thereunder. *Ante*, at 282. Yet I see no reason why a judgment should not be entitled to full res judicata effect under the Full Faith and Credit Clause merely because the rendering tribunal was obligated to apply

the law of the forum—provided, of course, as was certainly the case here, that the forum could constitutionally apply its law. The plurality's analysis seems to grant state legislatures the power to delimit the scope of a cause of action for federal full faith and credit purposes merely by enacting choice-of-law rules binding on the State's workmen's compensation tribunals. The plurality criticizes the *McCartin* case for vesting in the State the power to determine the extraterritorial effect of its own laws and judgments, *ante*, at 271; yet it seems that its opinion is subject to the same objection. In any event, I am not convinced that Virginia, by instructing its Industrial Commission to apply Virginia law, could be said to have intended that the cause of action which merges in the Virginia judgment would not include claims under the laws of other States which arise out of precisely the same operative facts.

As a matter of logic, the plurality's analysis would seemingly apply to many everyday tort actions. I see no difference for full faith and credit purposes between a statute which lays down a forum-favoring choice-of-law rule and a common-law doctrine stating the same principle. Hence when a court, having power in the abstract to apply the law of another State, determines by application of the forum's choice-of-law rules to apply the substantive law of the forum, I would think that under the plurality's analysis the judgment would not determine rights arising under the law of some other State. Suppose, for example, that in a wrongful-death action the court enters judgment on liability against the defendant, and determines to apply the law of the forum which sets a limit on the recovery allowed. The plurality's analysis would seem to permit the plaintiff to obtain a subsequent judgment in a second forum for damages exceeding the first forum's liability limit.

The plurality does say that factual determinations by a workmen's compensation board will be entitled to collateral-estoppel effect in a second forum. *Ante*, at 280–281. While this rule does, to an extent, circumscribe the broadest possible

implications of the plurality's reasoning, there would remain many cases, such as the wrongful-death example discussed above, in which the second forum could provide additional recovery as a matter of substantive law while remaining true to the first forum's factual determinations. Moreover, the dispositive issues in tort actions are frequently mixed questions of law and fact as to which the second forum might apply its own rule of decision without obvious violation of the principles articulated by four Members of the Court. Actions by the defendant which satisfy the relevant standard of care in the first forum might nevertheless be considered "negligent" under the law of the second forum.

Hence the plurality's rationale would portend a wide-ranging reassessment of the principles of full faith and credit in many areas. Such a reassessment is not necessarily undesirable if the results are likely to be healthy for the judicial system and consistent with the underlying purposes of the Full Faith and Credit Clause. But at least without the benefit of briefs and arguments directed to the issue, I cannot conclude that the rule advocated by the plurality would have such a beneficial impact.

One purpose of the Full Faith and Credit Clause is to bring an end to litigation. As the Court noted in *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348–349 (1942):

> "Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries."

The plurality's opinion is at odds with this principle of finality. Plaintiffs dissatisfied with a judgment would have every incentive to seek additional recovery elsewhere, so long as the first forum applied its own law and there was a colorable argument that as a matter of law the second forum would per-

mit a greater recovery. It seems to me grossly unfair that the plaintiff, having the initial choice of the forum, should be given the additional advantage of a second adjudication should his choice prove disappointing. Defendants, on the other hand, would no longer be assured that the judgment of the first forum is conclusive as to their obligations, and would face the prospect of burdensome and multiple litigation based on the same operative facts. Such litigation would also impose added strain on an already overworked judicial system.

Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force. *Sherrer* v. *Sherrer*, 334 U. S. 343, 355 (1948). The plurality's rationale would substantially undercut that function. When a former judgment is set up as a defense under the Full Faith and Credit Clause, the court would be obliged to balance the various state interests involved. But the State of the second forum is not a neutral party to this balance. There seems to be a substantial danger—not presented by the firmer rule of res judicata—that the court in evaluating a full faith and credit defense would give controlling weight to its own parochial interests in concluding that the judgment of the first forum is not res judicata in the subsequent suit.

I would not overrule either *Magnolia* or *McCartin*. To my mind, Mr. Chief Justice Stone's opinion in *Magnolia* states the sounder doctrine; as noted, I do not see any overriding differences between workmen's compensation awards and court judgments that justify different treatment for the two. However, *McCartin* has been on the books for over 30 years and has been widely interpreted by state and federal courts as substantially limiting *Magnolia*. Unlike the plurality's opinion, *McCartin* is not subject to the objection that its principles are applicable outside the workmen's compensation area. Although I find *McCartin* to rest on questionable foundations, I am not now prepared to overrule it. And I agree with the plurality that *McCartin*, rather than *Magnolia*, is controlling as between the two precedents since the Virginia Workmen's

Compensation Act lacks the "unmistakable language" which *McCartin* requires if a workmen's compensation award is to preclude a subsequent award in another State. I therefore concur in the judgment.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE MARSHALL joins, dissenting.

This is clearly a case where the whole is less than the sum of its parts. In choosing between two admittedly inconsistent precedents, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430 (1943), and *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622 (1947), six of us agree that the latter decision, *McCartin*, is analytically indefensible. See *ante*, at 269–272 (plurality opinion); *infra*, at 291. The remaining three Members of the Court concede that it "rest[s] on questionable foundations." *Ante*, at 289 (opinion of WHITE, J., joined by BURGER, C. J., and POWELL, J.). Nevertheless, when the smoke clears, it is *Magnolia* rather than *McCartin* that the plurality suggests should be overruled. See *ante*, at 285–286. Because I believe that *Magnolia* was correctly decided, and because I fear that the rule proposed by the plurality is both ill-considered and ill-defined, I dissent.

In his opinion for the Court in *Magnolia*, Mr. Chief Justice Stone identified the issue as "whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law . . . bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law. . . ." 320 U. S., at 432. A majority of this Court answered that inquiry in the affirmative,[1] holding that the injured employee "was free

[1] The plurality characterizes the majority in *Magnolia* as "tenuous" because Mr. Justice Jackson joined four other Members of the Court in the belief that the result was dictated by *Williams* v. *North Carolina*, 317 U. S. 287 (1942), a decision from which he had dissented. See *ante*, at 267, n. 11. I do not read Mr. Justice Jackson's concurrence as casting any doubt upon the logical underpinning of *Magnolia*. Instead, he seemed to

to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds." *Id.*, at 444. With the substitution of Virginia and the District of Columbia for Texas and Louisiana, this case presents precisely the same question as *Magnolia*, and, I believe, demands precisely the same answer.

As the plurality today properly notes, *Magnolia* received rather rough treatment at the hands of a unanimous Court in *McCartin*. I need not dwell upon the inadequacies of that latter opinion, however, since the plurality itself spotlights those inadequacies quite convincingly. As it observes, *McCartin* is difficult, if not impossible, to reconcile with "normally accepted full faith and credit principles." *Ante*, at 270. I also agree completely with the plurality's ultimate conclusion that the rule announced in *McCartin* "represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions." *Ante*, at 271.

One might suppose that, having destroyed *McCartin*'s *ratio decidendi*, the plurality would return to the eminently defensible position adopted in *Magnolia*. But such is not the case. The plurality instead raises the banner of *"stare decisis"* and sets out in search of a new rationale to support the result reached in *McCartin*, significantly failing to even attempt to do the same thing for *Magnolia*.

If such *post hoc* rationalization seems a bit odd, the theory ultimately chosen by the plurality is even odder. It would seem that, contrary to the assumption of this Court for at least the past 40 years, a judgment awarding workmen's

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direct his concurrence at what he perceived to be an inconsistency in the position adopted by Mr. Justice Black and Mr. Justice Douglas, both of whom had joined *Williams* but were dissenting in *Magnolia*. For a similar exchange, see *Dennis* v. *United States*, 339 U. S. 162, 173–175 (1950) (Jackson, J., concurring in result), and *id.*, at 175–181 (Black, J., dissenting).

compensation benefits is no longer entitled to full faith and credit unless, and only to the extent that, such a judgment resolves a disputed issue of fact. I believe that the plurality's justification for such a theory, which apparently first surfaced in a cluster of articles written in the wake of *Magnolia*,[2] does not withstand close scrutiny.

The plurality identifies three different "state interests" at stake in the present case: Virginia's interest in placing a limit on the potential liability of companies doing business in that State, Virginia's interest in the "integrity of its formal determinations of contested issues," and a shared interest of Virginia and the District of Columbia in the welfare of the injured employee. See *ante*, at 277. The plurality then undertakes to balance these interests and concludes that none of Virginia's concerns outweighs the concern of the District of Columbia for the welfare of petitioner.

Whenever this Court, or any court, attempts to balance competing interests it risks undervaluing or even overlooking important concerns. I believe that the plurality's analysis incorporates both errors. First, it asserts that Virginia's interest in limiting the liability of businesses operating within its borders can never outweigh the District of Columbia's interest in protecting its residents. In support of this proposition it cites *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532 (1935), and *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493 (1939). Both of those cases, however, involved the degree of faith and credit to be afforded *statutes* of one State by the courts of another State. The present case involves an enforceable *judgment* entered by Virginia after adjudicatory proceedings. In *Magnolia* Mr. Chief Justice Stone, who authored *both Alaska*

[2] See Cheatham, Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt, 44 Colum. L. Rev. 330, 341–346 (1944); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1229–1230 (1946); Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum L. Rev. 153, 176–177 (1949).

Packers and *Pacific Employers*, distinguished those two decisions for precisely this reason, chastising the lower court in that case for overlooking "the distinction, long recognized and applied by this Court, . . . between the faith and credit required to be given to judgments and that to which local common and statutory law is entitled under the Constitution and laws of the United States." 320 U. S., at 436. This distinction, which has also been overlooked by the plurality here, makes perfect sense, since Virginia surely has a stronger interest in limiting an employer's liability to a fixed amount when that employer has already been haled before a Virginia tribunal and adjudged liable than when the employer simply claims the benefit of a Virginia statute in a proceeding brought in another State.

In a similar vein, the plurality completely ignores any interest that Virginia might assert in the finality of its adjudications. While workmen's compensation awards may be "nonfinal" in the sense that they are subject to continuing supervision and modification, Virginia nevertheless has a cognizable interest in requiring persons who avail themselves of its statutory remedy to eschew other alternative remedies that might be available to them. Otherwise, as apparently is the result here, Virginia's efforts and expense on an applicant's behalf are wasted when that applicant obtains a duplicative remedy in another State.

At base, the plurality's balancing analysis is incorrect because it recognizes no significant difference between the events that transpired in this case and those that *would* have transpired had petitioner initially sought his remedy in the District of Columbia. But there are differences. The Commonwealth of Virginia has expended its resources, at petitioner's behest, to provide petitioner with a remedy for his injury and a resolution of his "dispute" with his employer. That employer similarly has expended its resources, again at petitioner's behest, in complying with the judgment entered by Virginia. These efforts, and the corresponding interests in seeing that

those efforts are not wasted, lie at the very heart of the divergent constitutional treatment of judgments and statutes. Compare *Magnolia Petroleum Co.* v. *Hunt* with *Alaska Packers Assn.* v. *Industrial Accident Comm'n* and *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n.* In this case, of course, Virginia and respondent employer expended very few resources in the administrative process. But that observation lends no assistance to the plurality, which would flatly hold that Virginia has absolutely no power to guarantee that a workmen's compensation award will be treated as a final judgment by other States.

In further support of its novel rule, the plurality attempts to distinguish the judgment entered in this case from one entered by a "court of general jurisdiction." See *ante*, at 282–283. Specifically, the plurality points out that the Industrial Commission of Virginia, unlike a state court of general jurisdiction, was limited by statute to consideration of Virginia law. According to the plurality, because the Commission "was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights." *Ante*, at 283. See also *ante*, at 285.

This argument might have some force if petitioner had somehow had Virginia law thrust upon him against his will. In this case, however, petitioner was free to choose the applicable law simply by choosing the forum in which he filed his initial claim. Unless the District of Columbia has an interest in forcing its residents to accept its law regardless of their wishes, I fail to see how the Virginia Commission's inability to look to District of Columbia law impinged upon that latter jurisdiction's interests. I thus fail to see why petitioner's election, as consummated in his Virginia award, should not be given the same full faith and credit as would be afforded a judgment entered by a court of general jurisdiction.

I suspect that my Brethren's insistence on ratifying *McCartin*'s result despite condemnation of its rationale is grounded in no small part upon their concern that injured workers are often coerced or maneuvered into filing their claims in jurisdictions amenable to their employers. There is, however, absolutely no evidence of such overreaching in the present case. Indeed, had there been "fraud, imposition, [or] mistake" in the filing of petitioner's claim, he would have been permitted, upon timely motion, to vacate the award. See *Harris* v. *Diamond Construction Co.*, 184 Va. 711, 720, 36 S. E. 2d 573, 577 (1946). In this regard, the award received by petitioner is treated no differently than any other judicial award, nor should it be.

There are, of course, exceptional judgments that this Court has indicated are not entitled to full faith and credit. See, *e. g.*, *Huntington* v. *Attrile*, 146 U. S. 657 (1892) (penal judgments); *Fall* v. *Eastin*, 215 U. S. 1 (1909) (judgment purporting to convey property in another State). Such exceptions, however, have been "few and far between. . . ." *Williams* v. *North Carolina*, 317 U. S. 287, 295 (1942). Furthermore, as this Court noted in *Magnolia*, there would appear to be no precedent for an exception in the case of a money judgment rendered in a civil suit. See 320 U. S., at 438. In this regard, there is no dispute that the award authorized by the Industrial Commission of Virginia here is, at least as a matter of Virginia law, equivalent to such a money judgment. See Va. Code §§ 65.1–40, 65.1–100.1 (1980).

I fear that the plurality, in its zeal to remedy a perceived imbalance in bargaining power, would badly distort an important constitutional tenet. Its "interest analysis," once removed from the statutory choice-of-law context considered by the Court in *Alaska Packers* and *Pacific Employers*, knows no metes or bounds. Given the modern proliferation of quasi-judicial methods for resolving disputes and of various tribunals of limited jurisdiction, such a rule could only lead to

confusion.[3] I find such uncertainty unacceptable, and prefer the rule originally announced in *Magnolia Petroleum Co.* v. *Hunt*, a rule whose analytical validity is, even yet, unchallenged.

The Full Faith and Credit Clause did not allot to this Court the task of "balancing" interests where the "public Acts, Records, and judicial Proceedings" of a State were involved. It simply directed that they be given the "Full Faith and Credit" that the Court today denies to those of Virginia. I would affirm the judgment of the court below.

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[3] Arbitration awards, for example, have traditionally been afforded full faith and credit. See, *e. g.*, *Pan American Food Co.* v. *Lester Lawrence & Son, Inc.*, 147 F. Supp. 113 (ND Ill. 1956); *United States Plywood Corp.* v. *Hudson Lumber Co.*, 127 F. Supp. 489 (SDNY 1954); *Port Realty Development Corp.* v. *Aim Consolidated Distribution, Inc.*, 90 Misc. 2d 757, 395 N. Y. S. 2d 905 (1977). Yet such proceedings incorporate many of the same features found important by this Court in excepting workmen's compensation awards from that requirement. See also *ante*, at 288–289 (opinion of WHITE, J.).

Syllabus

HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* McRAE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 79–1268. Argued April 21, 1980—Decided June 30, 1980

Title XIX of the Social Security Act established the Medicaid program in 1965 to provide federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Since 1976, versions of the so-called Hyde Amendment have severely limited the use of any federal funds to reimburse the cost of abortions under the Medicaid program. Actions were brought in Federal District Court by appellees (including indigent pregnant women, who sued on behalf of all women similarly situated, the New York City Health and Hospitals Corp., which operates hospitals providing abortion services, officers of the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division), and the Women's Division itself), seeking to enjoin enforcement of the Hyde Amendment on grounds that it violates, *inter alia*, the Due Process Clause of the Fifth Amendment and the Religion Clauses of the First Amendment, and that, despite the Hyde Amendment, a participating State remains obligated under Title XIX to fund all medically necessary abortions. Ultimately, the District Court, granting injunctive relief, held that the Hyde Amendment had substantively amended Title XIX to relieve a State of any obligation to fund those medically necessary abortions for which federal reimbursement is unavailable, but that the Amendment violates the equal protection component of the Fifth Amendment's Due Process Clause and the Free Exercise Clause of the First Amendment.

Held:

1. Title XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. Pp. 306–311.

(a) The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted or in its legislative history suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. To the contrary, Congress' purpose in enacting Title XIX was to provide federal financial

assistance for all legitimate state expenditures under an approved Medicaid plan. Pp. 308–309.

(b) Nor does the Hyde Amendment's legislative history contain any indication that Congress intended to shift the entire cost of some medically necessary abortions to the participating States, but rather suggests that Congress has always assumed that a participating State would not be required to fund such abortions once federal funding was withdrawn pursuant to the Hyde Amendment. Pp. 310–311.

2. The funding restrictions of the Hyde Amendment do not impinge on the "liberty" protected by the Due Process Clause of the Fifth Amendment held in *Roe* v. *Wade*, 410 U. S. 113, 168, to include the freedom of a woman to decide whether to terminate a pregnancy. Pp. 312–318.

(a) The Hyde Amendment places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. Cf. *Maher* v. *Roe*, 432 U. S. 464. P. 315.

(b) Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, *supra*, it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. Pp. 316–317.

(c) To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Pp. 317–318.

3. Nor does the Hyde Amendment violate the Establishment Clause of the First Amendment. The fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman

Catholic Church does not, without more, contravene that Clause. Pp. 319–320.

4. Appellees lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. The named appellees consisting of indigent pregnant women suing on behalf of other women similarly situated lack such standing because none alleged, much less proved, that she sought an abortion under compulsion of religious belief. The named appellees consisting of officers of the Women's Division, although they provided a detailed description of their religious beliefs, failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid, and they therefore lacked the personal stake in the controversy needed to confer standing to raise such a challenge to the Hyde Amendment. And the Women's Division does not satisfy the standing requirements for an organization to assert the rights of its membership, since the asserted claim is one that required participation of the individual members for a proper understanding and resolution of their free exercise claims. Pp. 320–321.

5. The Hyde Amendment does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 321–326.

(a) While the presumption of constitutional validity of a statutory classification that does not itself impinge on a right or liberty protected by the Constitution disappears if the classification is predicated on criteria that are "suspect," the Hyde Amendment is not predicated on a constitutionally suspect classification. *Maher* v. *Roe*, *supra*. Although the impact of the Amendment falls on the indigent, that fact does not itself render the funding restrictions constitutionally invalid, for poverty, standing alone, is not a suspect classification. Pp. 322–323.

(b) Where, as here, Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard, since, by encouraging childbirth except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of protecting potential life. Pp. 324–326.

491 F. Supp. 630, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 327. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 329. MARSHALL,

J., *post*, p. 337, BLACKMUN, J., *post*, p. 348, and STEVENS, J., *post*, p. 349, filed dissenting opinions.

Solicitor General McCree argued the cause for appellant. With him on the briefs were *Assistant Attorney General Daniel* and *Eloise E. Davies*. *Victor G. Rosenblum, Dennis J. Horan, John D. Gorby, Carl Anderson, Patrick A. Trueman, A. Lawrence Washburn, Jr.*, and *Gerald E. Bodell* filed briefs for Buckley et al., appellees under this Court's Rule 10 (4), in support of appellant.

Rhonda Copelon argued the cause for appellees McRae et al. With her on the briefs were *Nancy Stearns, Sylvia Law, Ellen K. Sawyer, Janet Benshoof, Judith Levin, Harriet Pilpel*, and *Eve Paul*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents statutory and constitutional questions concerning the public funding of abortions under Title XIX of the Social Security Act, commonly known as the "Medicaid" Act, and recent annual Appropriations Acts containing

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*Briefs of *amici curiae* urging reversal were filed by *John T. Noonan, Jr.*, and *William B. Ball* for Representative Jim Wright et al.; and by *Wilfred R. Caron* and *Patrick F. Geary* for the United States Catholic Conference.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, and *Peter Bienstock, Arnold D. Fleischer*, and *Barbara E. Levy*, Assistant Attorneys General, for the State of New York et al., joined by *Rufus L. Edmisten*, Attorney General of North Carolina, *William F. O'Connell*, Special Deputy Attorney General, and *Steven Mansfield Shaber*, Associate Attorney General, and *James A. Redden*, Attorney General of Oregon; by *Leo Pfeffer* for the American Ethical Union et al.; by *Barbara Ellen Handschu* for the Association of Legal Aid Attorneys of the City of New York—District 65—U. A. W. et al.; and by *Phyllis N. Segal* and *Judith I. Avner* for the National Organization for Women et al.

Briefs of *amici curiae* were filed by *Nadine Taub* for the Bergen-Passaic Health Systems Agency et al.; by *James G. Kolb* for the Coalition for Human Justice; by *Sanjord Jay Rosen* for the National Council of Churches of Christ in the U. S. A.; and by *Sanford Jay Rosen* for the United Presbyterian Church in the U. S. A.

the so-called "Hyde Amendment." The statutory question is whether Title XIX requires a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. The constitutional question, which arises only if Title XIX imposes no such requirement, is whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment.

I

The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. II), for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.

One such requirement is that a participating State agree to provide financial assistance to the "categorically needy" [1] with respect to five general areas of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing

[1] The "categorically needy" include families with dependent children eligible for public assistance under the Aid to Families with Dependent Children program, 42 U. S. C. § 601 *et seq.*, and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program, 42 U. S. C. § 1381 *et seq.* See 42 U. S. C. § 1396a (a)(10)(A). Title XIX also permits a State to extend Medicaid benefits to other needy persons, termed "medically needy." See 42 U. S. C. § 1396a (a)(10)(C). If a State elects to include the medically needy in its Medicaid plan, it has the option of providing somewhat different coverage from that required for the categorically needy. See 42 U. S. C. § 1396a (a)(13)(C).

facilities services, periodic screening and diagnosis of children, and family planning services, and (5) services of physicians. 42 U. S. C. §§ 1396a (a)(13)(B), 1396d (a)(1)–(5). Although a participating State need not "provide funding for all medical treatment falling within the five general categories, [Title XIX] does require that [a] state Medicaid pla[n] establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].' 42 U. S. C. § 1396a (a)(17)." *Beal* v. *Doe*, 432 U. S. 438, 441.

Since September 1976, Congress has prohibited—either by an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare [2] or by a joint resolution—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the "Hyde Amendment," after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

> "[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." Pub. L. 96–123, § 109, 93 Stat. 926.

See also Pub. L. 96–86, § 118, 93 Stat. 662. This version of the Hyde Amendment is broader than that applicable for fiscal year 1977, which did not include the "rape or incest"

[2] The Department of Health, Education, and Welfare was recently reorganized and divided into the Department of Health and Human Services and the Department of Education. The original designation is retained for purposes of this opinion.

exception, Pub. L. 94–439, § 209, 90 Stat. 1434, but narrower than that applicable for most of fiscal year 1978,[3] and all of fiscal year 1979, which had an additional exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians," Pub. L. 95–205, § 101, 91 Stat. 1460; Pub. L. 95–480, § 210, 92 Stat. 1586.[4]

On September 30, 1976, the day on which Congress enacted the initial version of the Hyde Amendment, these consolidated cases were filed in the District Court for the Eastern District of New York. The plaintiffs—Cora McRae, a New York Medicaid recipient then in the first trimester of a pregnancy that she wished to terminate, the New York City Health and Hospitals Corp., a public benefit corporation that operates 16 hospitals, 12 of which provide abortion services, and others—sought to enjoin the enforcement of the funding restriction on abortions. They alleged that the Hyde Amendment violated the First, Fourth, Fifth, and Ninth Amendments of the Constitution insofar as it limited the funding of abortions to those necessary to save the life of the mother, while permitting the funding of costs associated with childbirth. Although the sole named defendant was the Secretary of Health, Education, and Welfare, the District Court permitted Senators James L. Buckley and Jesse A. Helms and Representative Henry J. Hyde to intervene as defendants.[5]

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[3] The appropriations for HEW during October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that continued in effect the version of the Hyde Amendment applicable during fiscal year 1977. Pub. L. 95–130, 91 Stat. 1153; Pub. L. 95–165, 91 Stat. 1323.

[4] In this opinion, the term "Hyde Amendment" is used generically to refer to all three versions of the Hyde Amendment, except where indicated otherwise.

[5] Although the intervenor-defendants are appellees in the Secretary's direct appeal to this Court, see this Court's Rule 10 (4), the term "appellees" is used in this opinion to refer only to the parties who were the plaintiffs in the District Court.

After a hearing, the District Court entered a preliminary injunction prohibiting the Secretary from enforcing the Hyde Amendment and requiring him to continue to provide federal reimbursement for abortions under the standards applicable before the funding restriction had been enacted. *McRae* v. *Mathews*, 421 F. Supp. 533. Although stating that it had not expressly held that the funding restriction was unconstitutional, since the preliminary injunction was not its final judgment, the District Court noted that such a holding was "implicit" in its decision granting the injunction. The District Court also certified the *McRae* case as a class action on behalf of all pregnant or potentially pregnant women in the State of New York eligible for Medicaid and who decide to have an abortion within the first 24 weeks of pregnancy, and of all authorized providers of abortion services to such women. *Id.*, at 543.

The Secretary then brought an appeal to this Court. After deciding *Beal* v. *Doe*, 432 U. S 438, and *Maher* v. *Roe*, 432 U. S. 464, we vacated the injunction of the District Court and remanded the case for reconsideration in light of those decisions. *Califano* v. *McRae*, 433 U. S. 916.

On remand, the District Court permitted the intervention of several additional plaintiffs, including (1) four individual Medicaid recipients who wished to have abortions that allegedly were medically necessary but did not qualify for federal funds under the versions of the Hyde Amendment applicable in fiscal years 1977 and 1978, (2) several physicians who perform abortions for Medicaid recipients, (3) the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division), and (4) two individual officers of the Women's Division.

An amended complaint was then filed, challenging the various versions of the Hyde Amendment on several grounds. At the outset, the plaintiffs asserted that the District Court need not address the constitutionality of the Hyde Amend-

ment because, in their view, a participating State remains obligated under Title XIX to fund all medically necessary abortions, even if federal reimbursement is unavailable. With regard to the constitutionality of the Hyde Amendment, the plaintiffs asserted, among other things, that the funding restrictions violate the Religion Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment.

After a lengthy trial, which inquired into the medical reasons for abortions and the diverse religious views on the subject,[6] the District Court filed an opinion and entered a judgment invalidating all versions of the Hyde Amendment on constitutional grounds.[7] The District Court rejected the plaintiffs' statutory argument, concluding that even though Title XIX would otherwise have required a participating State to fund medically necessary abortions, the Hyde Amendment had substantively amended Title XIX to relieve a State of that funding obligation. Turning then to the constitutional issues, the District Court concluded that the Hyde Amendment, though valid under the Establishment Clause,[8] violates the equal protection component of the Fifth Amendment's Due Process Clause and the Free Exercise Clause of the First Amendment. With regard to the Fifth Amendment, the District Court noted that when an abortion is "medically necessary to safeguard the pregnant woman's health, . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate

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[6] The trial, which was conducted between August 1977 and September 1978, produced a record containing more than 400 documentary and film exhibits and a transcript exceeding 5,000 pages.

[7] *McRae* v. *Califano*, 491 F. Supp. 630.

[8] The District Court found no Establishment Clause infirmity because, in its view, the Hyde Amendment has a secular legislative purpose, its principal effect neither advances nor inhibits religion, and it does not foster an excessive governmental entanglement with religion.

her pregnancy in order to preserve her health."[9] *McRae* v. *Califano*, 491 F. Supp. 630, 737. The court concluded that the Hyde Amendment violates the equal protection guarantee because, in its view, the decision of Congress to fund medically necessary services generally but only certain medically necessary abortions serves no legitimate governmental interest. As to the Free Exercise Clause of the First Amendment, the court held that insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the funding restrictions of the Hyde Amendment violate that constitutional guarantee as well.

Accordingly, the District Court ordered the Secretary to "[c]ease to give effect" to the various versions of the Hyde Amendment insofar as they forbid payments for medically necessary abortions. It further directed the Secretary to "[c]ontinue to authorize the expenditure of federal matching funds [for such abortions]." App. 87. In addition, the court recertified the *McRae* case as a nationwide class action on behalf of all pregnant and potentially pregnant women eligible for Medicaid who wish to have medically necessary abortions, and of all authorized providers of abortions for such women.[10]

The Secretary then applied to this Court for a stay of the judgment pending direct appeal of the District Court's decision. We denied the stay, but noted probable jurisdiction of this appeal. 444 U. S. 1069.

II

It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound

[9] The District Court also apparently concluded that the Hyde Amendment operates to the disadvantage of a "suspect class," namely, teenage women desiring medically necessary abortions. See n. 26, *infra*.

[10] Although the original class included only those pregnant women in the first two trimesters of their pregnancy, the recertified class included all pregnant women regardless of the stage of their pregnancy.

jurisprudential reasons, will inquire first into the statutory question. This practice reflects the deeply rooted doctrine "that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105. Accordingly, we turn first to the question whether Title XIX requires a State that participates in the Medicaid program to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. If a participating State is under such an obligation, the constitutionality of the Hyde Amendment need not be drawn into question in the present case, for the availability of medically necessary abortions under Medicaid would continue, with the participating State shouldering the total cost of funding such abortions.

The appellees assert that a participating State has an independent funding obligation under Title XIX because (1) the Hyde Amendment is, by its own terms, only a limitation on federal reimbursement for certain medically necessary abortions, and (2) Title XIX does not permit a participating State to exclude from its Medicaid plan any medically necessary service solely on the basis of diagnosis or condition, even if federal reimbursement is unavailable for that service.[11] It is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating

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[11] The appellees argue that their interpretation of Title XIX finds support in *Beal* v. *Doe*, 432 U. S. 438. There the Court considered the question whether Title XIX permits a participating State to exclude *non*-therapeutic abortions from its Medicaid plan. Although concluding that Title XIX does not preclude a State's refusal "to fund *unnecessary*—though perhaps desirable—medical services," the Court observed that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage." *Id.*, at 444–445 (emphasis in original). The Court in *Beal*, however, did not address the possible effect of the Hyde Amendment upon the operation of Title XIX.

State of its duty under Title XIX to provide for such abortions in its Medicaid plan.

The District Court rejected this argument. It concluded that, although Title XIX would otherwise have required a participating State to include medically necessary abortions in its Medicaid program, the Hyde Amendment substantively amended Title XIX so as to relieve a State of that obligation. This construction of the Hyde Amendment was said to find support in the decisions of two Courts of Appeals, *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121 (CA1 1979), and *Zbaraz* v. *Quern*, 596 F. 2d 196 (CA7 1979), and to be consistent with the understanding of the effect of the Hyde Amendment by the Department of Health, Education, and Welfare in the administration of the Medicaid program.

We agree with the District Court, but for somewhat different reasons. The Medicaid program created by Title XIX is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Under this system of "cooperative federalism," *King* v. *Smith*, 392 U. S. 309, 316, if a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, which include several mandatory categories of health services, the Federal Government agrees to pay a specified percentage of "the total amount expended . . . as medical assistance under the State plan. . . ." 42 U. S. C. § 1396b (a)(1). The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. Quite the contrary, the purpose of Congress in enacting Title XIX was to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan. See S. Rep. No. 404, 89th Cong., 1st

Sess., pt. 1, pp. 83–85 (1965); H. R. Rep. No. 213, 89th Cong., 1st Sess., 72–74 (1965).

Since the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding.[12] Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund. Thus, if Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services. This is not to say that Congress may not now depart from the original design of Title XIX under which the Federal Government shares the financial responsibility for expenses incurred under an approved Medicaid plan. It is only to say that, absent an indication of contrary legislative intent by a subsequent Congress, Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable.[13]

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[12] In *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 132 (CA1 1979), the opinion of the court by Judge Coffin noted:

"The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states, runs directly counter to the basic structure of the program and could seriously cripple a state's attempts to provide other necessary medical services embraced by its plan." (Footnote omitted.)

[13] When subsequent Congresses have deviated from the original structure of Title XIX by obligating a participating State to assume the full costs of a service as a prerequisite for continued federal funding of other services, they have always expressed their intent to do so in unambiguous terms. See *Zbaraz* v. *Quern*, 596 F. 2d 196, 200, n. 12 (CA7 1979).

Thus, by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable.[14] The legislative history of the Hyde Amendment contains no indication whatsoever that Congress intended to shift the entire cost of such services to the participating States. See *Zbaraz* v. *Quern*, *supra*, at 200 ("no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required"). Rather, the legislative history suggests that Congress has always assumed that a participating State would not be required to fund medically necessary abortions once federal funding was withdrawn pursuant to the Hyde Amendment.[15] See *Preterm, Inc.* v. *Dukakis*, *supra*, at 130 ("[t]he universal assumption in debate was that if the Amendment passed there would be no requirement that states carry on the service"). Accord, *Zbaraz* v. *Quern*, *supra*, at 200; *Hodgson* v. *Board of County Comm'rs*, 614 F. 2d 601, 612–613 (CA8

[14] Since Title XIX itself provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need not inquire, as the District Court did, whether the Hyde Amendment is a substantive amendment to Title XIX. The present case is thus different from *TVA* v. *Hill*, 437 U. S. 153, 189–193, where the issue was whether continued appropriations for the Tellico Dam impliedly repealed the substantive requirements of the Endangered Species Act prohibiting the continued construction of the Dam because it threatened the natural habitat of an endangered species.

[15] Our conclusion that the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan is corroborated by the fact that subsequent Congresses simply assumed that the withdrawal of federal funding under the Hyde Amendment for certain medically necessary abortions would relieve a participating State of any obligation to provide for such services in its Medicaid plan. See the cases cited in the text, *supra*.

1980); *Roe* v. *Casey*, 623 F. 2d 829, 834–837 (CA3 1980). Accordingly, we conclude that Title XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.[16]

III

Having determined that Title XIX does not obligate a participating State to pay for those medically necessary abortions for which Congress has withheld federal funding, we must consider the constitutional validity of the Hyde Amendment. The appellees assert that the funding restrictions of the Hyde Amendment violate several rights secured by the Constitution—(1) the right of a woman, implicit in the Due Process Clause of the Fifth Amendment, to decide whether to terminate a pregnancy, (2) the prohibition under the Establishment Clause of the First Amendment against any "law respecting an establishment of religion," and (3) the right to freedom of religion protected by the Free Exercise Clause of the First Amendment. The appellees also contend that, quite apart from substantive constitutional rights, the Hyde Amendment violates the equal protection component of the Fifth Amendment.[17]

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[16] A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable. See *Beal* v. *Doe*, 432 U. S., at 447; *Preterm, Inc.* v. *Dukakis*, *supra*, at 134. We hold only that a State *need* not include such abortions in its Medicaid plan.

[17] The appellees also argue that the Hyde Amendment is unconstitutionally vague insofar as physicians are unable to understand or implement the exceptions in the Hyde Amendment under which abortions are reimbursable. It is our conclusion, however, that the Hyde Amendment is not void for vagueness because (1) the sanction provision in the Medicaid Act contains a clear scienter requirement under which good-faith errors are not penalized, see *Colautti* v. *Franklin*, 439 U. S. 379, 395, and, (2), in any event, the exceptions in the Hyde Amendment "are set out in terms that the ordinary person exercising ordinary common sense can

It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Mobile* v. *Bolden*, 446 U. S. 55, 76 (plurality opinion). Accordingly, before turning to the equal protection issue in this case, we examine whether the Hyde Amendment violates any substantive rights secured by the Constitution.

A

We address first the appellees' argument that the Hyde Amendment, by restricting the availability of certain medically necessary abortions under Medicaid, impinges on the "liberty" protected by the Due Process Clause as recognized in *Roe* v. *Wade*, 410 U. S. 113, and its progeny.

In the *Wade* case, this Court held unconstitutional a Texas statute making it a crime to procure or attempt an abortion except on medical advice for the purpose of saving the mother's life. The constitutional underpinning of *Wade* was a recognition that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life.[18] This implicit constitutional liberty, the Court in *Wade* held, includes the freedom of a woman to decide whether to terminate a pregnancy.

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sufficiently understand and comply with, without sacrifice to the public interest." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 608.

[18] The Court in *Wade* observed that previous decisions of this Court had recognized that the liberty protected by the Due Process Clause "has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U. S. [438,] 453–454; *id.*, at 460, 463–465 (WHITE, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U. S. 390, 399 (1923)]." 410 U. S., at 152–153.

But the Court in *Wade* also recognized that a State has legitimate interests during a pregnancy in both ensuring the health of the mother and protecting potential human life. These state interests, which were found to be "separate and distinct" and to "gro[w] in substantiality as the woman approaches term," *id.*, at 162–163, pose a conflict with a woman's untrammeled freedom of choice. In resolving this conflict, the Court held that before the end of the first trimester of pregnancy, neither state interest is sufficiently substantial to justify any instrusion on the woman's freedom of choice. In the second trimester, the state interest in maternal health was found to be sufficiently substantial to justify regulation reasonably related to that concern. And at viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortions, except where necessary for the preservation of the life or health of the mother. Thus, inasmuch as the Texas criminal statute allowed abortions only where necessary to save the life of the mother and without regard to the stage of the pregnancy, the Court held in *Wade* that the statute violated the Due Process Clause of the Fourteenth Amendment.

In *Maher* v. *Roe*, 432 U. S. 464, the Court was presented with the question whether the scope of personal constitutional freedom recognized in *Roe* v. *Wade* included an entitlement to Medicaid payments for abortions that are not medically necessary. At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for medical services incident to childbirth, but not for medical services incident to nontherapeutic abortions. The District Court held that the regulation violated the Equal Protection Clause of the Fourteenth Amendment because the unequal subsidization of childbirth and abortion impinged on the "fundamental right to abortion" recognized in *Wade* and its progeny.

It was the view of this Court that "the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*." 432 U. S., at 471. The doctrine of *Roe* v. *Wade*, the Court held in *Maher*, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *id.*, at 473–474, such as the severe criminal sanctions at issue in *Roe* v. *Wade*, *supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52.

But the constitutional freedom recognized in *Wade* and its progeny, the *Maher* Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U. S., at 474. As the Court elaborated:

> "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Ibid.*

The Court in *Maher* noted that its description of the doctrine recognized in *Wade* and its progeny signaled "no retreat" from those decisions. In explaining why the con-

stitutional principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation of Connecticut to subsidize abortions, the Court cited the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 432 U. S., at 475–476 (footnote omitted). Thus, even though the Connecticut regulation favored childbirth over abortion by means of subsidization of one and not the other, the Court in *Maher* concluded that the regulation did not impinge on the constitutional freedom recognized in *Wade* because it imposed no governmental restriction on access to abortions.

The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. The present case does differ factually from *Maher* insofar as that case involved a failure to fund nontherapeutic abortions, whereas the Hyde Amendment withholds funding of certain medically necessary abortions. Accordingly, the appellees argue that because the Hyde Amendment affects a significant interest not present or asserted in *Maher*—the interest of a woman in protecting her health during pregnancy—and because that interest lies at the core of the personal constitutional freedom recognized in *Wade*, the present case is constitutionally different from *Maher*. It is the appellees' view that to the extent that the Hyde Amendment withholds funding for certain medically necessary abortions, it clearly impinges on the constitutional principle recognized in *Wade*.

It is evident that a woman's interest in protecting her health was an important theme in *Wade*. In concluding that the freedom of a woman to decide whether to terminate her pregnancy falls within the personal liberty protected by the Due Process Clause, the Court in *Wade* emphasized the fact that the woman's decision carries with it significant personal health implications—both physical and psychological. 410 U. S., at 153. In fact, although the Court in *Wade* recognized that the state interest in protecting potential life becomes sufficiently compelling in the period after fetal viability to justify an absolute criminal prohibition of nontherapeutic abortions, the Court held that even after fetal viability a State may not prohibit abortions "necessary to preserve the life or health of the mother." *Id.*, at 164. Because even the compelling interest of the State in protecting potential life after fetal viability was held to be insufficient to outweigh a woman's decision to protect her life or health, it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*.

But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize

medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.[19]

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal

[19] The appellees argue that the Hyde Amendment is unconstitutional because it "penalizes" the exercise of a woman's choice to terminate a pregnancy by abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250; *Shapiro* v. *Thompson*, 394 U. S. 618. This argument falls short of the mark. In *Maher*, the Court found only a "semantic difference" between the argument that Connecticut's refusal to subsidize nontherapeutic abortions "unduly interfere[d]" with the exercise of the constitutional liberty recognized in *Wade* and the argument that it "penalized" the exercise of that liberty. 432 U. S., at 474, n. 8. And, regardless of how the claim was characterized, the *Maher* Court rejected the argument that Connecticut's refusal to subsidize protected conduct, without more, impinged on the constitutional freedom of choice. This reasoning is equally applicable in the present case. A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert* v. *Verner*, 374 U. S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479, or prevent parents from sending their child to a private school, *Pierce* v. *Society of Sisters*, 268 U. S. 510, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.[20] Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.[21]

B

The appellees also argue that the Hyde Amendment contravenes rights secured by the Religion Clauses of the First

[20] As this Court in *Maher* observed: "The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." 432 U. S., at 469.

[21] Since the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient, see *Whalen* v. *Roe*, 429 U. S. 589, 604, and n. 33, we also reject the appellees' claim that the funding restrictions of the Hyde Amendment violate the due process rights of the physician who advises a Medicaid recipient to obtain a medically necessary abortion.

Amendment. It is the appellees' view that the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences. Moreover, insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the appellees assert that the funding limitations of the Hyde Amendment impinge on the freedom of religion guaranteed by the Free Exercise Clause.

1

It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education* v. *Regan*, 444 U. S. 646, 653. Applying this standard, the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson* v. *Board of Education*, 330 U. S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U. S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. *Ibid.* The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. 491 F. Supp., at 741. See also *Roe* v. *Wade*, 410 U. S., at 138–141. In sum, we are convinced that the fact that the funding restrictions in the

Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.

2

We need not address the merits of the appellees' arguments concerning the Free Exercise Clause, because the appellees lack standing to raise a free exercise challenge to the Hyde Amendment. The named appellees fall into three categories: (1) the indigent pregnant women who sued on behalf of other women similarly situated, (2) the two officers of the Women's Division, and (3) the Women's Division itself.[22] The named appellees in the first category lack standing to challenge the Hyde Amendment on free exercise grounds because none alleged, much less proved, that she sought an abortion under compulsion of religious belief.[23] See *McGowan* v. *Maryland*, *supra*, at 429. Although the named appellees in the second category did provide a detailed description of their religious beliefs, they failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid. These named appellees, therefore, lack the personal stake in the controversy needed to confer standing to raise such a challenge to the Hyde Amendment. See *Warth* v. *Seldin*, 422 U. S. 490, 498–499.

Finally, although the Women's Division alleged that its

[22] The remaining named appellees, including the individual physicians and the New York City Health and Hospitals Corp., did not attack the Hyde Amendment on the basis of the Free Exercise Clause of the First Amendment.

[23] These named appellees sued on behalf of the class of "women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary." But since we conclude below that the named appellees have not established their own standing to sue, "[t]hey cannot represent a class of whom they are not a part." *Bailey* v. *Patterson*, 369 U. S. 31, 32–33. See also *O'Shea* v. *Littleton*, 414 U. S. 488, 494–495.

membership includes "pregnant Medicaid eligible women who, as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment," the Women's Division does not satisfy the standing requirements for an organization to assert the rights of its membership. One of those requirements is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343. Since "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 223, the claim asserted here is one that ordinarily requires individual participation.[24] In the present case, the Women's Division concedes that "the permissibility, advisability and/or necessity of abortion according to circumstance is a matter about which there is diversity of view within . . . our membership, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." It is thus clear that the participation of individual members of the Women's Division is essential to a proper understanding and resolution of their free exercise claims. Accordingly, we conclude that the Women's Division, along with the other named appellees, lack standing to challenge the Hyde Amendment under the Free Exercise Clause.

C

It remains to be determined whether the Hyde Amendment violates the equal protection component of the Fifth Amendment. This challenge is premised on the fact that, although

[24] For example, in *Board of Education* v. *Allen*, 392 U. S. 236, 249, the Court found no free exercise violation since the plaintiffs had "not contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion." (Emphasis added.)

federal reimbursement is available under Medicaid for medically necessary services generally, the Hyde Amendment does not permit federal reimbursement of all medically necessary abortions. The District Court held, and the appellees argue here, that this selective subsidization violates the constitutional guarantee of equal protection.

The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties,[25] but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan* v. *Maryland*, 366 U. S., at 425. This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect," the principal example of which is a classification based on race, *e. g., Brown* v. *Board of Education*, 347 U. S. 483.

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For the reasons stated above, we have already concluded that the Hyde Amendment violates no constitutionally protected substantive rights. We now conclude as well that it is not predicated on a constitutionally suspect classification. In reaching this conclusion, we again draw guidance from the Court's decision in *Maher* v. *Roe*. As to whether the Con-

[25] An exception to this statement is to be found in *Reynolds* v. *Sims*, 377 U. S. 533, and its progeny. Although the Constitution of the United States does not confer the right to vote in state elections, see *Minor* v. *Happersett*, 21 Wall. 162, 178, *Reynolds* held that if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters. See, *e. g., Dunn* v. *Blumstein*, 405 U. S. 330, 336.

necticut welfare regulation providing funds for childbirth but not for nontherapeutic abortions discriminated against a suspect class, the Court in *Maher* observed:

> "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." 432 U. S., at 470–471, citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29; *Dandridge* v. *Williams*, 397 U. S. 471.

Thus, the Court in *Maher* found no basis for concluding that the Connecticut regulation was predicated on a suspect classification.

It is our view that the present case is indistinguishable from *Maher* in this respect. Here, as in *Maher*, the principal impact of the Hyde Amendment falls on the indigent. But that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification. See, *e. g.*, *James* v. *Valtierra*, 402 U. S. 137. That *Maher* involved the refusal to fund nontherapeutic abortions, whereas the present case involves the refusal to fund medically necessary abortions, has no bearing on the factors that render a classification "suspect" within the meaning of the constitutional guarantee of equal protection.[26]

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[26] Although the matter is not free from doubt, the District Court seems to have concluded that teenage women desiring medically necessary abortions constitute a "suspect class" for purposes of triggering a heightened level of equal protection scrutiny. In this regard, the District Court observed that the Hyde Amendment "clearly operate[s] to the disadvan-

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The remaining question then is whether the Hyde Amendment is rationally related to a legitimate governmental objective. It is the Government's position that the Hyde Amendment bears a rational relationship to its legitimate interest in protecting the potential life of the fetus. We agree.

In *Wade*, the Court recognized that the State has an "important and legitimate interest in protecting the potentiality of human life." 410 U. S., at 162. That interest was found to exist throughout a pregnancy, "grow[ing] in substantiality as the woman approaches term." *Id.*, at 162–163. See also *Beal* v. *Doe*, 432 U. S., at 445–446. Moreover, in *Maher*, the Court held that Connecticut's decision to fund the costs associated with childbirth but not those associated with nontherapeutic abortions was a rational means of advancing the legitimate state interest in protecting potential life by

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tage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy . . . , and particularly those seventeen and under." 491 F. Supp., at 738. The "statutory" class to which the District Court was referring is derived from the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U. S. C. § 300a–21 *et seq.* (1976 ed., Supp. II). It was apparently the view of the District Court that since statistics indicate that women under 21 years of age are disproportionately represented among those for whom an abortion is medically necessary, the Hyde Amendment invidiously discriminates against teenage women.

But the Hyde Amendment is facially neutral as to age, restricting funding for abortions for women of all ages. The District Court erred, therefore, in relying solely on the disparate impact of the Hyde Amendment in concluding that it discriminated on the basis of age. The equal protection component of the Fifth Amendment prohibits only purposeful discrimination, *Washington* v. *Davis*, 426 U. S. 229, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279. There is no evidence to support such a finding of intent in the present case.

encouraging childbirth. 432 U. S., at 478–479. See also *Poelker* v. *Doe*, 432 U. S. 519, 520–521.

It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened),[27] Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions.[28] Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.

After conducting an extensive evidentiary hearing into issues surrounding the public funding of abortions, the District Court concluded that "[t]he interests of . . . the federal government . . . in the fetus and in preserving it are not sufficient, weighed in the balance with the woman's threatened health, to justify withdrawing medical assistance unless the

[27] We address here the constitutionality of the most restrictive version of the Hyde Amendment, namely, that applicable in fiscal year 1976 under which federal funds were unavailable for abortions "except where the life of the mother would be endangered if the fetus were carried to term." Three versions of the Hyde Amendment are at issue in this case. If the most restrictive version is constitutionally valid, so too are the others.

[28] In fact, abortion is not the only "medically necessary" service for which federal funds under Medicaid are sometimes unavailable to otherwise eligible claimants. See 42 U. S. C. § 1396d (a)(17)(B) (inpatient hospital care of patients between 21 and 65 in institutions for tuberculosis or mental disease not covered by Title XIX).

woman consents . . . to carry the fetus to term." 491 F. Supp., at 737. In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts. It is the role of the courts only to ensure that congressional decisions comport with the Constitution.

Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard. It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488, quoted in *Dandridge* v. *Williams*, 397 U. S., at 484. Rather, "when an issue involves policy choices as sensitive as those implicated [here] . . . , the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe*, *supra*, at 479.

IV

For the reasons stated in this opinion, we hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment. It is also our view that the appellees

lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. Accordingly, the judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion and judgment with these additional remarks.

Roe v. *Wade*, 410 U. S. 113 (1973), held that prior to viability of the fetus, the governmental interest in potential life was insufficient to justify overriding the due process right of a pregnant woman to terminate her pregnancy by abortion. In the last trimester, however, the State's interest in fetal life was deemed sufficiently strong to warrant a ban on abortions, but only if continuing the pregnancy did not threaten the life or health of the mother. In the latter event, the State was required to respect the choice of the mother to terminate the pregnancy and protect her health.

Drawing upon *Roe* v. *Wade* and the cases that followed it, MR. JUSTICE STEVENS' dissent extrapolates the general proposition that the governmental interest in potential life may in no event be pursued at the expense of the mother's health. It then notes that under the Hyde Amendment, Medicaid refuses to fund abortions where carrying to term threatens maternal health but finances other medically indicated procedures, including childbirth. The dissent submits that the Hyde Amendment therefore fails the first requirement imposed by the Fifth Amendment and recognized by the Court's opinion today—that the challenged official action must serve a legitimate governmental goal, *ante*, at 324.

The argument has a certain internal logic, but it is not legally sound. The constitutional right recognized in *Roe* v. *Wade* was the right to choose to undergo an abortion without coercive interference by the government. As the Court

points out, *Roe* v. *Wade* did not purport to adjudicate a right to have abortions funded by the government, but only to be free from unreasonable official interference with private choice. At an appropriate stage in a pregnancy, for example, abortions could be prohibited to implement the governmental interest in potential life, but in no case to the damage of the health of the mother, whose choice to suffer an abortion rather than risk her health the government was forced to respect.

Roe v. *Wade* thus dealt with the circumstances in which the governmental interest in potential life would justify official interference with the abortion choices of pregnant women. There is no such calculus involved here. The Government does not seek to interfere with or to impose any coercive restraint on the choice of any woman to have an abortion. The woman's choice remains unfettered, the Government is not attempting to use its interest in life to justify a coercive restraint, and hence in disbursing its Medicaid funds it is free to implement rationally what *Roe* v. *Wade* recognized to be its legitimate interest in a potential life by covering the medical costs of childbirth but denying funds for abortions. Neither *Roe* v. *Wade* nor any of the cases decided in its wake invalidates this legislative preference. We decided as much in *Maher* v. *Roe*, 432 U. S. 464 (1977), when we rejected the claims that refusing funds for nontherapeutic abortions while defraying the medical costs of childbirth, although not an outright prohibition, nevertheless infringed the fundamental right to choose to terminate a pregnancy by abortion and also violated the equal protection component of the Fifth Amendment. I would not abandon *Maher* and extend *Roe* v. *Wade* to forbid the legislative policy expressed in the Hyde Amendment.

Nor can *Maher* be successfully distinguished on the ground that it involved only nontherapeutic abortions that the Government was free to place outside the ambit of its Medicaid program. That is not the ground on which *Maher* pro-

ceeded. *Maher* held that the government need not fund elective abortions because withholding funds rationally furthered the State's legitimate interest in normal childbirth. We sustained this policy even though under *Roe* v. *Wade*, the government's interest in fetal life is an inadequate justification for coercive interference with the pregnant woman's right to choose an abortion, whether or not such a procedure is medically indicated. We have already held, therefore, that the interest balancing involved in *Roe* v. *Wade* is not controlling in resolving the present constitutional issue. Accordingly, I am satisfied that the straightforward analysis followed in MR. JUSTICE STEWART's opinion for the Court is sound.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.*

I agree entirely with my Brother STEVENS that the State's interest in protecting the potential life of the fetus cannot justify the exclusion of financially and medically needy women from the benefits to which they would otherwise be entitled solely because the treatment that a doctor has concluded is medically necessary involves an abortion. See *post*, at 351–352. I write separately to express my continuing disagreement [1] with the Court's mischaracterization of the nature of the fundamental right recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973), and its misconception of the manner in which that right is infringed by federal and state legislation withdrawing all funding for medically necessary abortions.

Roe v. *Wade* held that the constitutional right to personal privacy encompasses a woman's decision whether or not to

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*[This opinion applies also to No. 79–4, *Williams et al.* v. *Zbaraz et al.*, No. 79–5, *Miller, Acting Director, Illinois Department of Public Aid, et al.* v. *Zbaraz et al.*, and No. 79–491, *United States* v. *Zbaraz et al.*, *post*, p. 358.]

[1] See *Maher* v. *Roe*, 432 U. S. 464, 482–490 (1977) (BRENNAN, J., dissenting).

terminate her pregnancy. *Roe* and its progeny [2] established that the pregnant woman has a right to be free from state interference with her choice to have an abortion—a right which, at least prior to the end of the first trimester, absolutely prohibits any governmental regulation of that highly personal decision.[3] The proposition for which these cases stand thus is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion. The Hyde Amendment's denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have.[4]

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[2] *E. g., Doe* v. *Bolton*, 410 U. S. 179 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Singleton* v. *Wulff*, 428 U. S. 106 (1976); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); cf. *Carey* v. *Population Services International*, 431 U. S. 678 (1977).

[3] After the first trimester, the State, in promoting its interest in the mother's health, may regulate the abortion *procedure* in ways that are reasonably related to that end. And even after the point of viability is reached, state regulation in furtherance of its interest in the potentiality of human life may not go so far as to proscribe abortions that are necessary to preserve the life or health of the mother. See *Roe* v. *Wade*, 410 U. S. 113, 164–165 (1973).

[4] My focus throughout this opinion is upon the coercive impact of the congressional decision to fund one outcome of pregnancy—childbirth—while not funding the other—abortion. Because I believe this alone renders the Hyde Amendment unconstitutional, I do not dwell upon the other disparities that the Amendment produces in the treatment of rich and poor, pregnant and nonpregnant. I concur completely, however, in my Brother STEVENS' discussion of those disparities. Specifically, I agree that the congressional decision to fund all medically necessary procedures except for those that require an abortion is entirely irrational either as a means of allocating health-care resources or otherwise serving legitimate social welfare goals. And that irrationality in turn exposes the Amend-

When viewed in the context of the Medicaid program to which it is appended, it is obvious that the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe* v. *Wade* said it could not do directly.[5] Under Title XIX of the Social Security Act, the Federal Government reimburses participating States for virtually all medically necessary services it provides to the categorically needy. The sole limitation of any significance is the Hyde Amendment's prohibition against the use of any federal funds to pay for the

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ment for what it really is—a deliberate effort to discourage the exercise of a constitutionally protected right.

It is important to put this congressional decision in human terms. Nonpregnant women may be reimbursed for all medically necessary treatments. Pregnant women with analogous ailments, however, will be reimbursed only if the treatment involved does not happen to include an abortion. Since the refusal to fund will in some significant number of cases force the patient to forgo medical assistance, the result is to refuse treatment for some genuine maladies not because they need not be treated, cannot be treated, or are too expensive to treat, and not because they relate to a deliberate choice to abort a pregnancy, but merely because treating them would as a practical matter require termination of that pregnancy. Even were one of the view that legislative hostility to abortions could justify a decision to fund obstetrics and child delivery services while refusing to fund nontherapeutic abortions, the present statutory scheme could not be saved. For here, that hostility has gone a good deal farther. Its consequence is to leave indigent sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated. Antipathy to abortion, in short, has been permitted not only to ride roughshod over a woman's constitutional right to terminate her pregnancy in the fashion she chooses, but also to distort our Nation's health-care programs. As a means of delivering health services, then, the Hyde Amendment is completely irrational. As a means of preventing abortions, it is concededly rational—brutally so. But this latter goal is constitutionally forbidden.

[5] Cf. *Singleton* v. *Wulff*, *supra*, at 118–119, n. 7:

"For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary."

costs of abortions (except where the life of the mother would be endangered if the fetus were carried to term). As my Brother STEVENS persuasively demonstrates, exclusion of medically necessary abortions from Medicaid coverage cannot be justified as a cost-saving device. Rather, the Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases. "When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless." *Beal* v. *Doe*, 432 U. S. 438, 462 (1977) (MARSHALL, J., dissenting). Though it may not be this Court's mission "to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy," *ante*, at 326, it most assuredly is our responsibility to vindicate the pregnant woman's constitutional right to decide whether to bear children free from governmental intrusion.

Moreover, it is clear that the Hyde Amendment not only was designed to inhibit, but does in fact inhibit the woman's freedom to choose abortion over childbirth. "Pregnancy is unquestionably a condition requiring medical services. . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. '[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alter-

native medical methods of dealing with pregnancy. . . .'" *Beal* v. *Doe*, *supra*, at 449 (BRENNAN, J., dissenting) (quoting *Roe* v. *Norton*, 408 F. Supp. 660, 663, n. 3 (Conn. 1975)). In every pregnancy, one of these two courses of treatment is medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with that procedure. But under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe* v. *Wade*.

The Court's contrary conclusion is premised on its belief that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Ante*, at 316. Accurate as this statement may be, it reveals only half the picture. For what the Court fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth.

A poor woman in the early stages of pregnancy confronts two alternatives: she may elect either to carry the fetus to term or to have an abortion. In the abstract, of course, this choice is hers alone, and the Court rightly observes that the Hyde Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Ante*, at 315. But the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an

offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women would have chosen to have an abortion if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure.

The fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions. Implicit in the Court's reasoning is the notion that as long as the Government is not obligated to provide its citizens with certain benefits or privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights.

It would belabor the obvious to expound at any great length on the illegitimacy of a state policy that interferes with the exercise of fundamental rights through the selective bestowal of governmental favors. It suffices to note that we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice. To take but one example of many, *Sherbert* v. *Verner*, 374 U. S. 398 (1963), involved a South Carolina unemployment insurance statute that required recipients to accept suitable employment when offered, even if the grounds for refusal stemmed from religious convictions. Even though the recipients possessed no entitlement to compensation, the Court held that the State could not cancel the

benefits of a Seventh-Day Adventist who had refused a job requiring her to work on Saturdays. The Court's explanation is particularly instructive for the present case:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.*, at 404–406.

See also *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583 (1926); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). Cf. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974).

The Medicaid program cannot be distinguished from these other statutory schemes that unconstitutionally burdened

fundamental rights.[6] Here, as in *Sherbert*, the government withholds financial benefits in a manner that discourages the exercise of a due process liberty: The indigent woman who chooses to assert her constitutional right to have an abortion can do so only on pain of sacrificing health-care benefits to which she would otherwise be entitled. Over 50 years ago, Mr. Justice Sutherland, writing for the Court in *Frost & Frost Trucking Co.* v. *Railroad Comm'n, supra*, at 593–594, made the following observation, which is as true now as it was then:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by

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[6] The Court rather summarily rejects the argument that the Hyde Amendment unconstitutionally penalizes the woman's exercise of her right to choose an abortion with the comment that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Ante*, at 317, n. 19. To begin with, the Court overlooks the fact that there is "more" than a simple refusal to fund a protected activity in this case; instead, there is a program that selectively funds but one of two choices of a constitutionally protected decision, thereby penalizing the election of the disfavored option.

Moreover, it is no answer to assert that no "penalty" is being imposed because the State is only refusing to pay for the specific costs of the protected activity rather than withholding other Medicaid benefits to which the recipient would be entitled or taking some other action more readily characterized as "punitive." Surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefit to Republicans "represents simply a refusal to subsidize certain protected conduct," *ibid.*, and does not involve the denial of any other governmental benefits. Whether the State withholds only the special costs of a disfavored option or penalizes the individual more broadly for the manner in which she exercises her choice, it cannot interfere with a constitutionally protected decision through the coercive use of governmental largesse.

which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.*

Three years ago, in *Maher* v. *Roe*, 432 U. S. 464 (1977), the Court upheld a state program that excluded nontherapeutic abortions from a welfare program that generally subsidized the medical expenses incidental to pregnancy and childbirth. At that time, I expressed my fear "that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions" on governmental funding for abortion. *Id.*, at 462 (dissenting both in *Maher* v. *Roe*, *supra*, and in *Beal* v. *Doe*, 432 U. S. 438 (1977), and *Poelker* v. *Doe*, 432 U. S. 519 (1977)).

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*[This opinion applies also to No. 79–4, *Williams et al.* v. *Zbaraz et al.*, No. 79–5, *Miller, Acting Director, Illinois Department of Public Aid, et al.* v. *Zbaraz et al.*, and No. 79–491, *United States* v. *Zbaraz et al.*, *post*, p. 358.]

That fear has proved justified. Under the Hyde Amendment, federal funding is denied for abortions that are medically necessary and that are necessary to avert severe and permanent damage to the health of the mother. The Court's opinion studiously avoids recognizing the undeniable fact that for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves. If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term. Because legal abortion is not a realistic option for such women, the predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services.

The legislation before us is the product of an effort to deny to the poor the constitutional right recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973), even though the cost may be serious and long-lasting health damage. As my Brother STEVENS has demonstrated, see *post*, p. 349 (dissenting opinion), the premise underlying the Hyde Amendment was repudiated in *Roe* v. *Wade*, where the Court made clear that the state interest in protecting fetal life cannot justify jeopardizing the life or health of the mother. The denial of Medicaid benefits to individuals who meet all the statutory criteria for eligibility, solely because the treatment that is medically necessary involves the exercise of the fundamental right to chose abortion, is a form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution. The Court's decision today marks a retreat from *Roe* v. *Wade* and represents a cruel blow to the most powerless members of our society. I dissent.

I

In its present form, the Hyde Amendment restricts federal funding for abortion to cases in which "the life of the mother would be endangered if the fetus were carried to term" and "for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." See *ante*, at 302. Federal funding is thus unavailable even when severe and long-lasting health damage to the mother is a virtual certainty. Nor are federal funds available when severe health damage, or even death, will result to the fetus if it is carried to term.

The record developed below reveals that the standards set forth in the Hyde Amendment exclude the majority of cases in which the medical profession would recommend abortion as medically necessary. Indeed, in States that have adopted a standard more restrictive than the "medically necessary" test of the Medicaid Act, the number of funded abortions has decreased by over 98%. App. 289.

The impact of the Hyde Amendment on indigent women falls into four major categories. First, the Hyde Amendment prohibits federal funding for abortions that are necessary in order to protect the health and sometimes the life of the mother. Numerous conditions—such as cancer, rheumatic fever, diabetes, malnutrition, phlebitis, sickle cell anemia, and heart disease—substantially increase the risks associated with pregnancy or are themselves aggravated by pregnancy. Such conditions may make an abortion medically necessary in the judgment of a physician, but cannot be funded under the Hyde Amendment. Further, the health risks of undergoing an abortion increase dramatically as pregnancy becomes more advanced. By the time a pregnancy has progressed to the point where a physician is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death because abortion is no

longer safe. There are also instances in which a woman's life will not be immediately threatened by carrying the pregnancy to term, but aggravation of another medical condition will significantly shorten her life expectancy. These cases as well are not fundable under the Hyde Amendment.

Second, federal funding is denied in cases in which severe mental disturbances will be created by unwanted pregnancies. The result of such psychological disturbances may be suicide, attempts at self-abortion, or child abuse. The Hyde Amendment makes no provision for funding in such cases.

Third, the Hyde Amendment denies funding for the majority of women whose pregnancies have been caused by rape or incest. The prerequisite of a report within 60 days serves to exclude those who are afraid of recounting what has happened or are in fear of unsympathetic treatment by the authorities. Such a requirement is, of course, especially burdensome for the indigent, who may be least likely to be aware that a rapid report to the authorities is indispensable in order for them to be able to obtain an abortion.

Finally, federal funding is unavailable in cases in which it is known that the fetus itself will be unable to survive. In a number of situations it is possible to determine in advance that the fetus will suffer an early death if carried to term. The Hyde Amendment, purportedly designed to safeguard "the legitimate governmental objective of protecting potential life," *ante*, at 325, excludes federal funding in such cases.

An optimistic estimate indicates that as many as 100 excess deaths may occur each year as a result of the Hyde Amendment.[1] The record contains no estimate of the health damage that may occur to poor women, but it shows that it will be considerable.[2]

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[1] See App. 294–296.

[2] For example, the number of serious complications deriving from abortions was estimated to be about 100 times the number of deaths from abortions. See *id.*, at 200.

II

The Court resolves the equal protection issue in this case through a relentlessly formalistic catechism. Adhering to its "two-tiered" approach to equal protection, the Court first decides that so-called strict scrutiny is not required because the Hyde Amendment does not violate the Due Process Clause and is not predicated on a constitutionally suspect classification. Therefore, "the validity of classification must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.'" *Ante*, at 322 (bracketed material in original), quoting *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). Observing that previous cases have recognized "the legitimate governmental objective of protecting potential life," *ante*, at 325, the Court concludes that the Hyde Amendment "establishe[s] incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid," *ibid.*, and is therefore rationally related to that governmental interest.

I continue to believe that the rigid "two-tiered" approach is inappropriate and that the Constitution requires a more exacting standard of review than mere rationality in cases such as this one. Further, in my judgment the Hyde Amendment cannot pass constitutional muster even under the rational-basis standard of review.

A

This case is perhaps the most dramatic illustration to date of the deficiencies in the Court's obsolete "two-tiered" approach to the Equal Protection Clause. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 98–110 (1973) (MARSHALL, J., dissenting); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 318–321 (1976) (MARSHALL, J., dissenting); *Maher* v. *Roe*, 432 U. S., at 457–458 (MARSHALL, J., dissenting); *Vance* v. *Bradley*, 440 U. S. 93,

113–115 (1979) (MARSHALL, J., dissenting).[3] With all deference, I am unable to understand how the Court can afford the same level of scrutiny to the legislation involved here—whose cruel impact falls exclusively on indigent pregnant women—that it has given to legislation distinguishing opticians from opthalmologists, or to other legislation that makes distinctions between economic interests more than able to protect themselves in the political process. See *ante*, at 326, citing *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). Heightened scrutiny of legislative classifications has always been designed to protect groups "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 28.[4] And while it is now clear that traditional "strict scrutiny" is unavailable to protect the poor against classifications that disfavor them, *Dandridge* v. *Williams*, 397 U. S. 471 (1970), I do not believe that legislation that imposes a crushing burden on indigent women can be treated with the same deference given to legislation distinguishing among business interests.

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[3] A number of individual Justices have expressed discomfort with the two-tiered approach, and I am pleased to observe that its hold on the law may be waning. See *Craig* v. *Boren*, 429 U. S. 190, 210–211, and n. * (1976) (POWELL, J., concurring); *id.*, at 211–212 (STEVENS, J., concurring); *post*, at 352, n. 4 (STEVENS, J., dissenting). Further, the Court has adopted an "intermediate" level of scrutiny for a variety of classifications. See *Trimble* v. *Gordon*, 430 U. S. 762 (1977) (illegitimacy); *Craig* v. *Boren*, *supra* (sex discrimination); *Foley* v. *Connelie*, 435 U. S. 291 (1978) (alienage). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 324 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (affirmative action).

[4] For this reason the Court has on occasion suggested that classifications discriminating against the poor are subject to special scrutiny under the Fifth and Fourteenth Amendments. See *McDonald* v. *Board of Election*, 394 U. S. 802, 807 (1969); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966).

B

The Hyde Amendment, of course, distinguishes between medically necessary abortions and other medically necessary expenses.[5] As I explained in *Maher* v. *Roe*, *supra*, such classifications must be assessed by weighing " 'the importance of the governmental benefits denied, the character of the class, and the asserted state interests,' " *id.*, at 458, quoting *Massachusetts Bd. of Retirement* v. *Murgia*, *supra*, at 322. Under that approach, the Hyde Amendment is clearly invalid.[6]

As in *Maher*, the governmental benefits at issue here are "of absolutely vital importance in the lives of the recipients." *Maher* v. *Roe*, *supra*, at 458 (MARSHALL, J., dissenting). An indigent woman denied governmental funding for a medically necessary abortion is confronted with two grotesque choices. First, she may seek to obtain "an illegal abortion that poses a serious threat to her health and even her life." 432 U. S., at 458. Alternatively, she may attempt to bear the child, a course that may both significantly threaten her health and eliminate any chance she might have had "to control the direction of her own life," *id.*, at 459.

The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races. As I observed in *Maher*, nonwhite women obtain abortions at nearly double the rate of whites, *ibid.* In my view, the fact that the burden of the Hyde Amendment falls exclusively on financially destitute women

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[5] As my Brother STEVENS suggests, see *post*, at 355, n. 8 (dissenting opinion), the denial of funding for those few medically necessary services that are excluded from the Medicaid program is based on a desire to conserve federal funds, not on a desire to penalize those who suffer the excluded disabilities.

[6] In practical effect, my approach is not in this context dissimilar to that taken in *Craig* v. *Boren*, *supra*, at 197, where the Court referred to an intermediate standard of review requiring that classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."

suggests "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). For this reason, I continue to believe that "a showing that state action has a devastating impact on the lives of minority racial groups must be relevant" for purposes of equal protection analysis. *Jefferson* v. *Hackney*, 406 U. S. 535, 575–576 (1972) (MARSHALL, J., dissenting).

As I explained in *Maher*, the asserted state interest in protecting potential life is insufficient to "outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women." 432 U. S., at 461. In *Maher*, the Court found a permissible state interest in encouraging normal childbirth. *Id.*, at 477–479. The governmental interest in the present case is substantially weaker than in *Maher*, for under the Hyde Amendment funding is refused even in cases in which normal childbirth will not result: one can scarcely speak of "normal childbirth" in cases where the fetus will die shortly after birth, or in which the mother's life will be shortened or her health otherwise gravely impaired by the birth. Nevertheless, the Hyde Amendment denies funding even in such cases. In these circumstances, I am unable to see how even a minimally rational legislature could conclude that the interest in fetal life outweighs the brutal effect of the Hyde Amendment on indigent women. Moreover, both the legislation in *Maher* and the Hyde Amendment were designed to deprive poor and minority women of the constitutional right to choose abortion. That purpose is not constitutionally permitted under *Roe* v. *Wade*.

C

Although I would abandon the strict-scrutiny/rational-basis dichotomy in equal protection analysis, it is by no

means necessary to reject that traditional approach to conclude, as I do, that the Hyde Amendment is a denial of equal protection. My Brother BRENNAN has demonstrated that the Amendment is unconstitutional because it impermissibly infringes upon the individual's constitutional right to decide whether to terminate a pregnancy. See *ante*, at 332–334 (dissenting opinion). And as my Brother STEVENS demonstrates, see *post*, at 350–352 (dissenting opinion), the Government's interest in protecting fetal life is not a legitimate one when it is in conflict with "the preservation of the life or health of the mother," *Roe* v. *Wade*, 410 U. S., at 165, and when the Government's effort to make serious health damage to the mother "a more attractive alternative than abortion," *ante*, at 325, does not rationally promote the governmental interest in encouraging normal childbirth.

The Court treats this case as though it were controlled by *Maher*. To the contrary, this case is the mirror image of *Maher*. The result in *Maher* turned on the fact that the legislation there under consideration discouraged only nontherapeutic, or medically unnecessary, abortions. In the Court's view, denial of Medicaid funding for nontherapeutic abortions was not a denial of equal protection because Medicaid funds were available only for medically necessary procedures. Thus the plaintiffs were seeking benefits which were not available to others similarly situated. I continue to believe that *Maher* was wrongly decided. But it is apparent that while the plaintiffs in *Maher* were seeking a benefit not available to others similarly situated, appellees are protesting their exclusion from a benefit that is available to all others similarly situated. This, it need hardly be said, is a crucial difference for equal protection purposes.

Under Title XIX and the Hyde Amendment, funding is available for essentially all necessary medical treatment for the poor. Appellees have met the statutory requirements for eligibility, but they are excluded because the treatment that is medically necessary involves the exercise of a funda-

mental right, the right to choose an abortion. In short, these appellees have been deprived of a governmental benefit for which they are otherwise eligible, solely because they have attempted to exercise a constitutional right. The interest asserted by the Government, the protection of fetal life, has been declared constitutionally subordinate to appellees' interest in preserving their lives and health by obtaining medically necessary treatment. *Roe* v. *Wade, supra.* And finally, the purpose of the legislation was to discourage the exercise of the fundamental right. In such circumstances the Hyde Amendment must be invalidated because it does not meet even the rational-basis standard of review.

III

The consequences of today's opinion—consequences to which the Court seems oblivious—are not difficult to predict. Pregnant women denied the funding necessary to procure abortions will be restricted to two alternatives. First, they can carry the fetus to term—even though that route may result in severe injury or death to the mother, the fetus, or both. If that course appears intolerable, they can resort to self-induced abortions or attempt to obtain illegal abortions—not because bearing a child would be inconvenient, but because it is necessary in order to protect their health.[7] The result will not be to protect what the Court describes as "the legitimate governmental objective of protecting potential life," *ante,* at 325, but to ensure the destruction of both fetal and maternal life. "There is another world 'out there,' the existence of which the Court . . . either chooses to ignore or fears

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[7] Of course, some poor women will attempt to raise the funds necessary to obtain a lawful abortion. A court recently found that those who were fortunate enough to do so had to resort to "not paying rent or utility bills, pawning household goods, diverting food and clothing money, or journeying to another state to obtain lower rates or fraudulently use a relative's insurance policy. . . . [S]ome patients were driven to theft." *Women's Health Services, Inc.* v. *Maher,* 482 F. Supp. 725, 731, n. 9.

to recognize." *Beal* v. *Doe*, 432 U. S., at 463 (BLACKMUN, J., dissenting). In my view, it is only by blinding itself to that other world that the Court can reach the result it announces today.

Ultimately, the result reached today may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds. In today's decision, as in *Maher* v. *Roe*, the Court suggests that a withholding of funding imposes no real obstacle to a woman deciding whether to exercise her constitutionally protected procreative choice, even though the Government is prepared to fund all other medically necessary expenses, including the expenses of childbirth. The Court perceives this result as simply a distinction between a "limitation on governmental power" and "an affirmative funding obligation." *Ante*, at 318. For a poor person attempting to exercise her "right" to freedom of choice, the difference is imperceptible. As my Brother BRENNAN has shown, see *ante*, at 332–334 (dissenting opinion), the differential distribution of incentives—which the Court concedes is present here, see *ante*, at 325—can have precisely the same effect as an outright prohibition. It is no more sufficient an answer here than it was in *Roe* v. *Wade* to say that " 'the appropriate forum' " for the resolution of sensitive policy choices is the legislature. See *ante*, at 326, quoting *Maher* v. *Roe*, at 479.

More than 35 years ago, Mr. Justice Jackson observed that the "task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence." *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). These constitutional principles, he observed for the Court, "grew in soil which also produced a philosophy that the individual['s] . . . liberty was attainable through mere absence of governmental restraints." *Ibid.* Those principles must be "transplant[ed] . . . to a soil in which the *laissez-faire* concept or principle of non-

interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls." *Id.*, at 640.

In this case, the Federal Government has taken upon itself the burden of financing practically all medically necessary expenditures. One category of medically necessary expenditure has been singled out for exclusion, and the sole basis for the exclusion is a premise repudiated for purposes of constitutional law in *Roe* v. *Wade*. The consequence is a devastating impact on the lives and health of poor women. I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result. I dissent.

MR. JUSTICE BLACKMUN, dissenting.*

I join the dissent of MR. JUSTICE BRENNAN and agree wholeheartedly with his and MR. JUSTICE STEVENS' respective observations and descriptions of what the Court is doing in this latest round of "abortion cases." I need add only that I find what I said in dissent in *Beal* v. *Doe*, 432 U. S. 438, 462 (1977), and its two companion cases, *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Poelker* v. *Doe*, 432 U. S. 519 (1977), continues for me to be equally pertinent and equally applicable in these Hyde Amendment cases. There is "condescension" in the Court's holding that "she may go elsewhere for her abortion"; this is "disingenuous and alarming"; the Government "punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound"; the "financial argument, of course, is specious"; there truly is "another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore

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or fears to recognize"; the "cancer of poverty will continue to grow"; and "the lot of the poorest among us," once again, and still, is not to be bettered.

MR. JUSTICE STEVENS, dissenting.*

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100. When the sovereign provides a special benefit or a special protection for a class of persons, it must define the membership in the class by neutral criteria; it may not make special exceptions for reasons that are constitutionally insufficient.

These cases involve the pool of benefits that Congress created by enacting Title XIX of the Social Security Act in 1965. Individuals who satisfy two neutral statutory criteria—financial need and medical need—are entitled to equal access to that pool. The question is whether certain persons who satisfy those criteria may be denied access to benefits solely because they must exercise the constitutional right to have an abortion in order to obtain the medical care they need. Our prior cases plainly dictate the answer to that question.

A fundamentally different question was decided in *Maher* v. *Roe*, 432 U. S. 464. Unlike these plaintiffs, the plaintiffs in *Maher* did not satisfy the neutral criterion of medical need; they sought a subsidy for nontherapeutic abortions—medical procedures which by definition they did not need. In rejecting that claim, the Court held that their constitutional right to choose that procedure did not impose a duty on

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the State to subsidize the exercise of that right. Nor did the fact that the State had undertaken to pay for the necessary medical care associated with childbirth require the State also to pay for abortions that were not necessary; for only necessary medical procedures satisfied the neutral statutory criteria. Nontherapeutic abortions were simply outside the ambit of the medical benefits program. Thus, in *Maher*, the plaintiffs' desire to exercise a constitutional right gave rise to neither special access nor special exclusion from the pool of benefits created by Title XIX.

These cases involve a special exclusion of women who, by definition, are confronted with a choice between two serious harms: serious health damage to themselves on the one hand and abortion on the other. The competing interests are the interest in maternal health and the interest in protecting potential human life. It is now part of our law that the pregnant woman's decision as to which of these conflicting interests shall prevail is entitled to constitutional protection.[1]

In *Roe* v. *Wade*, 410 U. S. 113, and *Doe* v. *Bolton*, 410 U. S. 179, the Court recognized that the States have a legitimate and protectible interest in potential human life. 410 U. S., at 162. But the Court explicitly held that prior to fetal viability that interest may not justify any governmental burden on the woman's choice to have an abortion[2] nor even any

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[1] "In *Roe* v. *Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. That decision . . . is now part of our law. . . ." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 101 (STEVENS, J., concurring in part and dissenting in part).

[2] *Roe* v. *Wade* involved Texas statutes making it a crime to "procure an abortion," except when attempted to save the pregnant woman's life. 410 U. S., at 117–118. *Doe* v. *Bolton* involved the somewhat less onerous Georgia statutes making abortion a crime in most circumstances, the exceptions being abortions to save the pregnant woman from life or permanent health endangerment, cases in which there was a very likely irremediable birth defect in the child, and cases in which the pregnancy was

regulation of abortion except in furtherance of the State's interest in the woman's health. In effect, the Court held that a woman's freedom to elect to have an abortion prior to viability has absolute constitutional protection, subject only to valid health regulations. Indeed, in *Roe* v. *Wade* the Court held that even after fetal viability, a State may "regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*" *Id.*, at 165 (emphasis added). We have a duty to respect that holding. The Court simply shirks that duty in this case.

If a woman has a constitutional right to place a higher value on avoiding either serious harm to her own health or perhaps an abnormal childbirth [3] than on protecting potential life, the exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled. The Court's sterile equal protection analysis evades this critical though simple point. The Court focuses exclusively on the "legitimate interest in protecting the potential life of the fetus." *Ante*, at 324. It concludes that since the Hyde Amendments further that interest, the exclusion they create is rational and therefore constitutional. But it is mis-

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the result of rape. Those exceptions were subject to burdensome prior medical approvals, which were held to be unconstitutional. Subsequent cases have invalidated other burdens on the pregnant woman's free choice to abort. See *Planned Parenthood of Central Missouri* v. *Danforth*, *supra* (consent required of husband or, for an unmarried woman under 18, of a parent); *Bellotti* v. *Baird*, 443 U. S. 622 (consent required of either parent or superior court judge for an unmarried woman under 18).

[3] The Court rests heavily on the premise—recognized in both *Roe* and *Maher*—that the State's legitimate interest in preserving potential life provides a sufficient justification for funding medical services that are necessarily associated with normal childbirth without also funding abortions that are not medically necessary. The *Maher* opinion repeatedly referred to the policy of favoring "normal childbirth." See 432 U. S., at 477, 478, 479. But this case involves a refusal to fund abortions which are medically necessary to avoid abnormal childbirth.

leading to speak of the Government's legitimate interest in the fetus without reference to the context in which that interest was held to be legitimate. For *Roe* v. *Wade* squarely held that the States may not protect that interest when a conflict with the interest in a pregnant woman's health exists. It is thus perfectly clear that neither the Federal Government nor the States may exclude a woman from medical benefits to which she would otherwise be entitled solely to further an interest in potential life when a physician, "in appropriate medical judgment," certifies that an abortion is necessary "for the preservation of the life or health of the mother." *Roe* v. *Wade*, *supra*, at 165. The Court totally fails to explain why this reasoning is not dispositive here.[4]

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[4] These cases thus illustrate the flaw in the method of equal protection analysis by which one chooses among alternative "levels of scrutiny" and then determines whether the extent to which a particular legislative measure furthers a given governmental objective transcends the predetermined threshold. See *Craig* v. *Boren*, 429 U. S. 190, 211–212 (STEVENS, J., concurring). That method may simply bypass the real issue. The relevant question in these cases is whether the Court must attach greater weight to the individual's interest in being included in the class than to the governmental interest in keeping the individual out. Since *Roe* v. *Wade* squarely held that the individual interest in the freedom to elect an abortion and the state interest in protecting maternal health *both* outweigh the State's interest in protecting potential life prior to viability, the Court's "equal protection analysis" is doubly erroneous.

In responding to my analysis of this case, MR. JUSTICE WHITE has described the constitutional right recognized in *Roe* v. *Wade* as "the right to choose to undergo an abortion without coercive interference by the government" or a right "only to be free from unreasonable official interference with private choice." *Ante*, at 327, 328. No such language is found in the *Roe* opinion itself. Rather, that case squarely held that state interference is unreasonable if it attaches a greater importance to the interest in potential life than to the interest in protecting the mother's health. One could with equal justification describe the right protected by the First Amendment as the right to make speeches without coercive interference by the government and then sustain a government subsidy for all medically needy persons except those who publicly advocate a change of administration.

It cannot be denied that the harm inflicted upon women in the excluded class is grievous.[5] As the Court's comparison of the differing forms of the Hyde Amendment that have

[5] The record is replete with examples of serious physical harm. See, *e. g.*, Judge Dooling's opinion in *McRae* v. *Califano*, 491 F. Supp. 630, 670:

"Women, particularly young women, suffering from diabetes are likely to experience high risks of health damage to themselves and their fetuses; the woman may become blind through the worsening during pregnancy of a diabetic retinopathy; in the case, particularly, of the juvenile diabetic, Dr. Eliot testified there is evidence that a series of pregnancies advances the diabetes faster; given an aggravated diabetic condition, other risks increased through pregnancy are kidney problems, and vascular problems of the extremities."

See also the affidavit of Jane Doe in No. 79–1268:

"3. I am 25 years old. I am married with four living children. Following the birth of my third child in November of 1976, I developed a serious case of phlebitis from which I have not completely recovered. Carrying another pregnancy to term would greatly aggravate this condition and increase the risk of blood clots to the lung.

"4. On July 29, 1977, I went to the Fertility Control Clinic at St. Paul-Ramsey Hospital, St. Paul, Minnesota to request an abortion. They informed me that a new law prohibits any federal reimbursement for abortions except those necessary to save the life of the mother and that they cannot afford to do this operation free for me.

"5. I cannot afford to pay for an abortion myself, and without Medicaid reimbursement, I cannot obtain a safe, legal abortion. According to the doctor, Dr. Jane E. Hodgson, without an abortion I might suffer serious and permanent health problems." App. in No. 79–1268, pp. 109–110.

And see the case of the Jane Doe in Nos. 79–4, 79–5, and 79–491, as recounted in Dr. Zbaraz' affidavit:

"Jane Doe is 38 years old and has had nine previous pregnancies. She has a history of varicose veins and thrombophlebitis (blood clots) of the left leg. The varicose veins can be, and in her case were, caused by multiple pregnancies: the weight of the uterus on her pelvic veins increased the blood pressure in the veins of her lower extremities; those veins dilated and her circulation was impaired, resulting in thrombophlebitis of her left leg. The varicosities of her lower extremities became so severe that they required partial surgical removal in 1973.

"2. Given this medical history, Jane Doe's varicose veins are almost

been enacted since 1976 demonstrates, the Court expressly approves the exclusion of benefits in "instances where severe and long-lasting physical health damage to the mother" is the predictable consequence of carrying the pregnancy to term. Indeed, as the Solicitor General acknowledged with commendable candor, the logic of the Court's position would justify a holding that it would be constitutional to deny funding to a medically and financially needy person even if abortion were the only lifesaving medical procedure available.[6] Because a denial of benefits for medically necessary abortions inevitably causes serious harm to the excluded women, it is tantamount to severe punishment.[7] In my judgment, that denial cannot be justified unless government may, in effect, punish women who want abortions. But as the Court unequivocally held in *Roe* v. *Wade*, this the government may not do.

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certain to recur if she continues her pregnancy. Such a recurrence would require a second operative procedure for their removal. Given her medical history, there is also about a 30% risk that her thrombophlebitis will recur during the pregnancy in the form of 'deep vein' thrombophlebitis (the surface veins of her left leg having previously been partially removed). This condition would impair circulation and might require prolonged hospitalization with bed rest.

"3. Considering Jane Doe's medical history of varicose veins and thrombophlebitis, particularly against the background of her age and multiple pregnancies, it is my view that an abortion is medically necessary for her, though not necessary to preserve her life." App. in Nos. 79–4, 79–5, and 79–491, p. 92.

[6] "QUESTION: Mr. Solicitor General, would you make the same rational basis argument if the Hyde amendment did not contain the exception for endangering the life of the mother, if it was her death rather than adverse impact on her health that was involved?

"Mr McCREE: I think I would." Tr. of Oral Arg. in 79–1268, p. 10.

[7] In this respect, these cases are entirely different from *Maher*, in which the Court repeatedly noted that the refusal to subsidize nontherapeutic abortions would merely result in normal childbirth. Surely the government may properly presume that no harm will ensue from normal childbirth.

Nor can it be argued that the exclusion of this type of medically necessary treatment of the indigent can be justified on fiscal grounds. There are some especially costly forms of treatment that may reasonably be excluded from the program in order to preserve the assets in the pool and extend its benefits to the maximum number of needy persons. Fiscal considerations may compel certain difficult choices in order to improve the protection afforded to the entire benefited class.[8] But, ironically, the exclusion of medically necessary abortions harms the entire class as well as its specific victims. For the records in both *McRae* and *Zbaraz* demonstrate that the cost of an abortion is only a small fraction of the costs associated with childbirth.[9] Thus, the decision to tolerate harm to indi-

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[8] This rationale may satisfactorily explain the exclusions from the Medicaid program noted by the Court. *Ante*, at 325, n. 28. In all events, it is safe to assume that those exclusions would conserve the assets of the pool.

[9] In the *Zbaraz* case, Judge Grady found that the average cost to the State of Illinois of an abortion was less than $150 as compared with the cost of a childbirth which exceeded $1,350. App. to Juris. Statement in No. 79–491, p. 14a, n. 8.

Indeed, based on an estimated cost of providing support to children of indigent parents together with their estimate of the number of medically necessary abortions that would be funded but for the Hyde Amendment, appellees in the *Zbaraz* case contend that in the State of Illinois alone the effect of the Hyde Amendment is to impose a cost of about $20,000,000 per year on the public fisc. Brief for Appellees in Nos. 79–4, 79–5, and 79–491, p. 60, n.

See also Judge Dooling's conclusion:

"While the debate [on the Hyde Amendment] in both years was on a rider to the departmental appropriations bill, it was quickly established that the restriction on abortion funding was not an economy measure; it was recognized that if an abortion was not performed for a medicaid eligible woman, the medicaid and other costs of childbearing and nurture would greatly exceed the cost of abortion. Opponents of funding restriction were equally at pains, however, to make clear that they did not favor funding abortion as a means of reducing the Government's social welfare costs." 491 F. Supp., at 644.

gent persons who need an abortion in order to avoid "serious and long-lasting health damage" is one that is financed by draining money out of the pool that is used to fund all other necessary medical procedures. Unlike most invidious classifications, this discrimination harms not only its direct victims but also the remainder of the class of needy persons that the pool was designed to benefit.

In *Maher* the Court stated:

> "The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." 432 U. S., at 469–470 (footnote omitted).

Having decided to alleviate some of the hardships of poverty by providing necessary medical care, the government must use neutral criteria in distributing benefits. It may not deny benefits to a financially and medically needy person simply because he is a Republican, a Catholic, or an Oriental—or because he has spoken against a program the government has a legitimate interest in furthering. In sum, it may not create exceptions for the sole purpose of furthering a governmental interest that is constitutionally subordinate to the individual interest that the entire program was designed to protect. The Hyde Amendments not only exclude financially and medically needy persons from the pool of benefits for a constitutionally insufficient reason; they also require the expenditure of millions and millions of dollars in order to thwart the exercise of a constitutional right, thereby effectively inflicting serious and long-lasting harm on impoverished women who want and need abortions for valid medical reasons. In my judgment, these Amendments constitute an unjustifiable,

and indeed blatant, violation of the sovereign's duty to govern impartially.[10]

I respectfully dissent.

[10] My conclusion that the Hyde Amendments violate the Federal Government's duty of impartiality applies equally to the Illinois statute at issue in *Zbaraz*.

WILLIAMS ET AL. *v.* ZBARAZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ILLINOIS

No. 79–4. Argued April 21, 1980—Decided June 30, 1980*

Appellees brought a class action in Federal District Court under 42 U. S. C. § 1983 to enjoin, on both federal statutory and constitutional grounds, enforcement of an Illinois statute prohibiting state medical assistance payments for all abortions except those necessary to save the life of the woman seeking the abortion. The District Court, granting injunctive relief, held that Title XIX of the Social Security Act, which established the Medicaid program, and the regulations promulgated thereunder require a participating State under such program to provide funding for all medically necessary abortions, and that the so-called Hyde Amendment prohibiting the use of federal funds to reimburse the costs of certain medically necessary abortions does not relieve a State of its independent obligation under Title XIX to provide Medicaid funding for all medically necessary abortions. The Court of Appeals reversed, holding that the Hyde Amendment altered Title XIX in such a way as to allow States to limit funding to the categories of abortions specified in that Amendment, but that a participating State may not, consistent with Title XIX, withhold funding of those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment, and the case was remanded to the District Court for modification of its injunction and with directions to consider the constitutionality of the Hyde Amendment. The District Court then held that both the Illinois statute and the Hyde Amendment violate the equal protection guarantee of the Constitution insofar as they deny funding for "medically necessary abortions prior to the point of fetal viability."

Held:

1. The District Court lacked jurisdiction to consider the constitutionality of the Hyde Amendment, for the court acted in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution. None of the parties ever challenged the validity of the Hyde Amendment, and appellees could have been awarded all the relief sought entirely on the basis of the District Court's

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*Together with No. 79–5, *Miller, Acting Director, Department of Public Aid of Illinois, et al.* v. *Zbaraz et al.*, and No. 79–491, *United States* v. *Zbaraz et al.*, also on appeal from the same court.

ruling as to the Illinois statute. The constitutionality of the Hyde Amendment was interjected as an issue only by the Court of Appeals' erroneous mandate, which could not create a case or controversy where none otherwise existed. P. 367.

2. Notwithstanding that the District Court had no jurisdiction to declare the Hyde Amendment unconstitutional, this Court has jurisdiction under 28 U. S. C. § 1252 over the "whole case," and thus may review the other issues preserved by these appeals. *McLucas* v. *DeChamplain*, 421 U. S. 21. Pp. 367–368.

3. A participating State is not obligated under Title XIX to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. *Harris* v. *McRae*, *ante*, at 306–311. P. 369.

4. The funding restrictions in the Illinois statute, comparable to those in the Hyde Amendment, do not violate the Equal Protection Clause of the Fourteenth Amendment. *Harris* v. *McRae*, *ante*, at 324–326. P. 369.

469 F. Supp. 1212, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *ante*, p. 329. MARSHALL, J., *ante*, p. 337, BLACKMUN, J., *ante*, p. 348, and STEVENS, J., *ante*, p. 349, filed dissenting opinions.

Victor G. Rosenblum argued the cause for appellants in No. 79–4. With him on the briefs were *Dennis J. Horan*, *John D. Gorby*, and *Patrick A. Trueman*. *William A. Wenzel III*, Special Assistant Attorney General of Illinois, argued the cause for appellants in No. 79–5. With him on the briefs were *William J. Scott*, Attorney General, and *James C. O'Connell* and *Ellen P. Brewin*, Special Assistant Attorneys General. *Solicitor General McCree* argued the cause for the United States in No. 79–491. With him on the briefs were *Assistant Attorney General Daniel* and *Eloise E. Davies*.

Robert W. Bennett argued the cause for appellees in each case. With him on the brief were *Lois J. Lipton*, *David Goldberger*, *Aviva Futorian*, *Robert E. Lehrer*, and *James D. Weill*.†

†Briefs of *amici curiae* urging reversal in all cases were filed by *Robert*

MR. JUSTICE STEWART delivered the opinion of the Court.

This suit was brought as a class action under 42 U. S. C. § 1983 in the District Court for the Northern District of Illinois to enjoin the enforcement of an Illinois statute that prohibits state medical assistance payments for all abortions except those "necessary for the preservation of the life of the woman seeking such treatment."[1] The plaintiffs were

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B. Hansen, Attorney General, *Paul M. Tinker*, Assistant Attorney General, and *Lynn D. Wardle* for the State of Utah; by *Bronson C. La Follette*, Attorney General of Wisconsin, *F. Joseph Sensenbrenner, Jr.*, Assistant Attorney General, and *William J. Brown*, Attorney General of Ohio, for the States of Wisconsin et al.; by *George E. Reed* and *Patrick F. Geary* for the United States Catholic Conference; and by *Daniel J. Popeo* for the Washington Legal Foundation. *John J. Degnan*, Attorney General, *Erminie L. Conley*, Assistant Attorney General, and *Andrea M. Silkowitz*, Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal in No. 79–5. *James Bopp, Jr.*, and *David D. Haynes* filed a brief for the National Right to Life Committee, Inc., as *amicus curiae* urging reversal in No. 79–4.

Briefs of *amici curiae* urging affirmance in all cases were filed by *Paul Bender*, *Thomas Harvey*, and *Roland Morris* for Jane Roe et al.; and by *Margo K. Rogers* and *Eve W. Paul* for the Planned Parenthood Federation of America, Inc., et al.

Briefs of *amici curiae* in all cases were filed by *Francis X. Bellotti*, Attorney General of Massachusetts, *Garrick F. Cole*, Assistant Attorney General, *John D. Ashcroft*, Attorney General of Missouri, *Paul L. Douglas*, Attorney General of Nebraska, and *William J. Brown*, Attorney General of Ohio, for the Commonwealth of Massachusetts et al.; by *Dorothy T. Lang* for the Physicians National Housestaff Association et al.; and by *Francis D. Morrissey* for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology.

[1] The statute is codified as Ill. Rev. Stat., ch. 23 (1979). It provides in relevant part:

"§ 5–5. [Medical services.] The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: [listing 16 categories of medical services], but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures

two physicians who perform medically necessary abortions for indigent women, a welfare rights organization, and Jane Doe, an indigent pregnant woman who alleged that she desired an abortion that was medically necessary, but not necessary to save her life. The defendant was the Director of the Illinois Department of Public Aid, the agency charged with administering the State's medical assistance programs.[2] Two other physicians intervened as defendants.

The plaintiffs challenged the Illinois statute on both federal statutory and constitutional grounds. They asserted, first, that Title XIX of the Social Security Act, commonly known as the "Medicaid" Act, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. II), requires Illinois to provide coverage in its Medicaid plan for all medically necessary abortions, whether or not the life of the pregnant woman is endangered. Second, the plaintiffs argued that the public funding by the State of medically necessary services generally, but not of certain medically necessary abortions, violates the Equal Protection Clause of the Fourteenth Amendment.

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are necessary for the preservation of the life of the woman seeking such treatment. . . ."

"§ 6–1. Eligibility requirements. . . . Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment. . . ."

"§ 7–1. Eligibility requirements. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article [to eligible persons], except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment. . . ."

[2] The medical assistance programs at issue here are the Illinois Medicaid plan, which is jointly funded by the Federal Government and the State of Illinois, and two fully state-funded programs, the Illinois General Assistance and Local Aid to Medically Indigent Programs.

The District Court initially held that it would abstain from considering the complaint until the state courts had construed the challenged statute.[3] The plaintiffs appealed, and the Court of Appeals for the Seventh Circuit reversed. *Zbaraz* v. *Quern*, 572 F. 2d 582. The appellate court held that abstention was inappropriate under the circumstances, and remanded the case for further proceedings, including consideration of the plaintiffs' motion for a preliminary injunction. On remand, the District Court certified two plaintiff classes: (1) a class of all pregnant women eligible for the Illinois medical assistance programs who desire medically necessary, but not life-preserving, abortions, and (2) a class of all Illinois physicians who perform medically necessary abortions for indigent women and who are certified to obtain reimbursement under the Illinois medical assistance programs.

Addressing the merits of the complaint, the District Court concluded that Title XIX and the regulations promulgated thereunder require a participating State under the Medicaid program to provide funding for all medically necessary abortions. According to the District Court, the so-called "Hyde Amendment"—under which Congress has prohibited the use of federal funds to reimburse the costs of certain medically necessary abortions[4]—does not relieve a State of its independ-

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[3] All opinions of the District Court other than that now under review are unreported.

[4] Since September 1976, Congress has prohibited—by means of the "Hyde Amendment" to the annual appropriations for the Department of Health, Education, and Welfare (now divided into the Department of Health and Human Services and the Department of Education)—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

"[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or

ent obligation under Title XIX to provide Medicaid funding for all medically necessary abortions. Thus, the District Court permanently enjoined the enforcement of the Illinois statute insofar as it denied payments for abortions that are "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health."

The Court of Appeals again reversed. *Zbaraz* v. *Quern*, 596 F. 2d 196. Reaching the same conclusion as had the Court of Appeals for the First Circuit in *Preterm, Inc.*, v. *Dukakis*, 591 F. 2d 121, the court held that the Hyde Amendment "alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment." 596 F. 2d, at 199. It further held, however, that a participating State may not, consistent with Title XIX, withhold funding for those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.[5] Accordingly, the case was remanded to the District

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incest has been reported promptly to a law enforcement agency or public health service." Pub. L. 96–123, § 109, 93 Stat. 926.

See also Pub. L. 96–86, § 118, 93 Stat. 662. This version of the Hyde Amendment is broader than that applicable for fiscal year 1977, which did not include the "rape or incest" exception, Pub. L. 94–439, § 209, 90 Stat. 1434, but narrower than that applicable for most of fiscal year 1978 and all of fiscal year 1979, which had an additional exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians," Pub. L. 95–205, § 101, 91 Stat. 1460; Pub. L. 95–480, § 210, 92 Stat. 1586. In this opinion, the term "Hyde Amendment" is used generically to refer to all three versions, except where indicated otherwise.

[5] Neither the Director of the Illinois Department of Public Aid nor the intervening-physicians sought review of the judgment of the Court of Appeals. The District Court in the proceedings now on appeal proceeded on the premise that Title XIX obligates Illinois to fund all abortions reimbursable under the Hyde Amendment. That issue, therefore, is not before us on these appeals.

Court with instructions that the permanent injunction be modified so as to require continued state funding only "for those abortions fundable under the Hyde Amendment." [6] *Id.*, at 202. The Court of Appeals also directed the District Court to proceed expeditiously to resolve the constitutional questions it had not reached. The District Court was specifically directed to consider "whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment." *Ibid.* (footnote omitted).

On the second remand, the District Court notified the Attorney General of the United States that the constitutionality of an Act of Congress had been drawn into question, and the United States intervened, pursuant to 28 U. S. C. § 2403 (a), to defend the constitutionality of the Hyde Amendment.[7]

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[6] Although the medical assistance programs funded exclusively by the State are not governed directly by either Title XIX or the Hyde Amendment, the Court of Appeals concluded that the modified injunction requiring state payments for abortions fundable under the Hyde Amendment should apply to all three Illinois medical assistance programs, see n. 2, *supra*. 596 F. 2d, at 202–203. Relying on a statement in the State's brief, the Court of Appeals held that the challenged Illinois statute was intended to represent the State's understanding of the congressional purpose reflected in the original Hyde Amendment. *Id.*, at 203. The Court of Appeals thus declined to sever the various funding restrictions in the Illinois statute.

[7] Section 2403 (a) provides:

"In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Zbaraz v. *Quern*, 469 F. Supp. 1212, 1215, n. 3. In view of the fact that the plaintiffs had not challenged the Hyde Amendment, but rather only the Illinois statute, the District Court expressed misgivings about the propriety of passing on the constitutionality of the federal law. But noting that the same reasoning would apply in determining the constitutional validity of both the Illinois statute and the Hyde Amendment, the District Court observed: "Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde Amendment and the relief granted will encompass both laws." *Ibid.*

The District Court then concluded that both the Illinois statute and the Hyde Amendment are unconstitutional insofar as they deny funding for "medically necessary abortions prior to the point of fetal viability." *Id.*, at 1221. If the public funding of abortions were restricted to those covered by the Hyde Amendment, the District Court thought that the effect would "be to increase substantially maternal morbidity and mortality among indigent pregnant women." *Id.*, at 1220. The District Court held that the state and federal funding restrictions violate the constitutional standard of equal protection because

> "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, 'the relative weights of the respective interests involved' shift, thereby legitimizing the state's interests. After that point, therefore, . . . a state may withhold funding for medically necessary abortions that

> are not life-preserving, even though it funds all other medically necessary operations." *Id.*, at 1221.

Accordingly, the District Court enjoined the Director of the Illinois Department of Public Aid from enforcing the Illinois statute to deny payment under the state medical assistance programs for medically necessary abortions prior to fetal viability.[8] The District Court did not, however, enjoin any action by the United States.

The intervening-defendant physicians, the Director of the Illinois Department of Public Aid, and the United States each appealed directly to this Court, averring jurisdiction under 28 U. S. C. § 1252. This Court consolidated the appeals and postponed further consideration of the question of jurisdiction until the hearing on the merits. 444 U. S. 962.

I

The asserted basis for this Court's jurisdiction over these appeals is 28 U. S. C. § 1252, which provides in relevant part:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

It is quite obvious that the literal requirements of § 1252 are satisfied in the present cases, for these appeals were taken from the final judgment of a federal court declaring unconstitutional an Act of Congress—the Hyde Amendment—in a

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[8] The District Court refused to stay its order, and the Director of the Illinois Department of Public Aid and the intervening-defendant physicians moved in this Court for a stay pending appeal. That motion was denied. 442 U. S. 1309 (STEVENS, J., in chambers). A reapplication by the intervening-defendant physicians also was denied. 442 U. S. 915.

civil action to which the United States was a party by reason of its intervention pursuant to 28 U. S. C. § 2403 (a).

It is equally clear, however, that the appellees and the United States are correct in asserting that the District Court in fact lacked jurisdiction to consider the constitutionality of the Hyde Amendment, for the court acted in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution. None of the parties to these cases ever challenged the validity of the Hyde Amendment, and the appellees could have been awarded all the relief they sought entirely on the basis of the District Court's ruling with regard to the Illinois statute.[9] The constitutional validity of the Hyde Amendment was interjected as an issue in these cases only by the erroneous mandate of the Court of Appeals. But, even though the District Court was simply following that mandate, the directive of the Court of Appeals could not create a case or controversy where none otherwise existed. It is clear, therefore, that the District Court exceeded its jurisdiction under Art. III in declaring the Hyde Amendment unconstitutional.

The question thus arises whether the District Court's lack of jurisdiction in declaring the Hyde Amendment unconstitutional divests this Court of jurisdiction over these appeals. We think not. As the Court in *McLucas* v. *DeChamplain*, 421 U. S. 21, 31–32, observed:

> "Our previous cases have recognized that this Court's jurisdiction under § 1252 in no way depends on whether the district court had jurisdiction. On the contrary, an appeal under § 1252 brings before us, not only the constitutional question, but the whole case, including thresh-

[9] Title XIX does not prohibit "[a] participating State . . . [from] includ[ing] in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable [under the Hyde Amendment]." *Harris* v. *McRae*, *ante*, at 311, n. 16.

> old issues of subject-matter jurisdiction, and whether a three-judge court was required." (Citations omitted.)

Thus, in the *McLucas* case, which involved an appeal under § 1252 from a single-judge District Court, this Court pretermitted the question whether the single-judge District Court had had jurisdiction to enter the challenged preliminary injunction, and instead resolved the appeal on the merits. It follows from *McLucas* that, notwithstanding the fact that the District Court was without jurisdiction to declare the Hyde Amendment unconstitutional, this Court has jurisdiction over these appeals and thus may review the "whole case." [10]

II

Disposition of the merits of these appeals does not require extended discussion. Insofar as we have already concluded that the District Court lacked jurisdiction to declare the Hyde Amendment unconstitutional, that portion of its judgment must be vacated. See, *e. g.*, *United States* v. *Johnson*, 319 U. S. 302; *Muskrat* v. *United States*, 219 U. S. 346. The remaining questions concern the Illinois statute. The appellees argue that (1) Title XIX requires Illinois to provide coverage in its state Medicaid plan for all medically necessary abortions, whether or not the life of the pregnant woman is endangered, and (2) the funding by Illinois of medically necessary services generally, but not of certain medically nec-

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[10] Although this Court need not pass on the remainder of the judgment in a case in which an appeal under § 1252 is taken from a court that lacked jurisdiction to declare a federal statute unconstitutional, see *FHA* v. *The Darlington, Inc.*, 352 U. S. 977, we are empowered to do so because "an appeal under § 1252 brings before us, not only the constitutional question, but the whole case." *McLucas* v. *DeChamplain*, 421 U. S., at 31. Here, there is no reason not to resolve the "whole case" on the merits. The remainder of the case that is properly before this Court, and which clearly involves a justiciable controversy, includes both the appellees' federal statutory and constitutional challenges to the Illinois statute.

essary abortions, violates the Equal Protection Clause of the Fourteenth Amendment.[11] Both arguments are foreclosed by our decision today in *Harris* v. *McRae, ante,* p. 279. As to the appellees' statutory argument, we have concluded in *McRae* that a participating State is not obligated under Title XIX to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. As to their constitutional argument, we have concluded in *McRae* that the Hyde Amendment does not violate the equal protection component of the Fifth Amendment by withholding public funding for certain medically necessary abortions, while providing funding for other medically necessary health services. It follows, for the same reasons, that the comparable funding restrictions in the Illinois statute do not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, the judgment of the District Court is vacated,

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[11] This case was decided by the District Court under the version of the Hyde Amendment applicable during fiscal year 1979, and Congress has since narrowed the ambit of the Hyde Amendment for fiscal year 1980, see n. 4, *supra.* The recent statutory revision does not, however, affect the outcome of either issue now before the Court. The statutory issue is not affected, because we today conclude in *Harris* v. *McRae, ante,* at 306–311, that Title XIX does not require a participating State to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment, including the version of the Hyde Amendment applicable for fiscal year 1980. The constitutional issue is not affected, because, regardless of whether the State of Illinois is obligated to fund all abortions for which federal reimbursement is available under the Hyde Amendment, we conclude in *Harris* v. *McRae* that even the most restrictive version of the Hyde Amendment—which is similar to the Illinois statute at issue here—does not violate the equal protection standard of the Constitution. Since the outcome of these issues is not affected by the recent changes in the Hyde Amendment, we need not defer review in order to provide the District Court with an opportunity to evaluate the effects of these changes in the federal law.

and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 329.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 337.]

[For dissenting opinion of MR. JUSTICE BLACKMUN, see *ante*, p. 348.]

[For dissenting opinion of MR. JUSTICE STEVENS, see *ante*, p. 349.]

UNITED STATES v. SIOUX NATION OF INDIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 79-639. Argued March 24, 1980—Decided June 30, 1980

Under the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation (Sioux), and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths of the adult male Sioux population. The treaty also reserved the Sioux' right to hunt in certain unceded territories. Subsequently, in 1876, an "agreement" presented to the Sioux by a special Commission but signed by only 10% of the adult male Sioux population, provided that the Sioux would relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations for as long as they would be needed. In 1877, Congress passed an Act (1877 Act) implementing this "agreement" and thus, in effect, abrogated the Fort Laramie Treaty. Throughout the ensuing years, the Sioux regarded the 1877 Act as a breach of that treaty, but Congress did not enact any mechanism by which they could litigate their claims against the United States until 1920, when a special jurisdictional Act was passed. Pursuant to this Act, the Sioux brought suit in the Court of Claims, alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. In 1942, this claim was dismissed by the Court of Claims, which held that it was not authorized by the 1920 Act to question whether the compensation afforded the Sioux in the 1877 Act was an adequate price for the Black Hills and that the Sioux' claim was a moral one not protected by the Just Compensation Clause. Thereafter, upon enactment of the Indian Claims Commission Act in 1946, the Sioux resubmitted their claim to the Indian Claims Commission, which held that the 1877 Act effected a taking for which the Sioux were entitled to just compensation and that the 1942 Court of Claims decision did not bar the taking claim under res judicata. On appeal, the Court of Claims, affirming the Commission's holding that a want of fair and honorable dealings on the Government's part was evidenced, ultimately held that the Sioux were entitled to an award of at least $17.5 million, without interest, as damages under the Indian Claims Commission Act,

for the lands surrendered and for gold taken by trespassing prospectors prior to passage of the 1877 Act. But the court further held that the merits of the Sioux' taking claim had been reached in its 1942 decision and that therefore such claim was barred by res judicata. The court noted that only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. Thereafter, in 1978, Congress passed an Act (1978 Act) providing for *de novo* review by the Court of Claims of the merits of the Indian Claims Commission's holding that the 1877 Act effected a taking of the Black Hills, without regard to res judicata, and authorizing the Court of Claims to take new evidence in the case. Pursuant to this Act, the Court of Claims affirmed the Commission's holding. In so affirming, the court, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property, applied the test of whether Congress had made a good-faith effort to give the Sioux the full value of their land. Under this test, the court characterized the 1877 Act as a taking in exercise of Congress' power of eminent domain over Indian property. Accordingly, the court held that the Sioux were entitled to an award of interest on the principal sum of $17.1 million (the fair market value of the Black Hills as of 1877), dating from 1877.

Held:

1. Congress' enactment of the 1978 Act, as constituting a mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States, did not violate the doctrine of the separation of powers either on the ground that Congress impermissibly disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in the case mere advisory opinions, or on the ground that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left that court no adjudicatory function to perform. *Cherokee Nation* v. *United States*, 270 U. S. 476. Congress, under its broad constitutional power to define and "to pay the Debts . . . of the United States," may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States. When the Sioux returned to the Court of Claims following passage of the 1978 Act, they were in pursuit of judicial enforcement of a new legal right. Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. *United States* v. *Klein*, 13 Wall. 128, distinguished. Pp. 390–407.

2. The Court of Claims' legal analysis and factual findings fully support its conclusion that the 1877 Act did not effect a "mere change in the form of investment of Indian tribal property," but, rather, effected a taking of tribal property which had been set aside by the Fort Laramie Treaty for the Sioux' exclusive occupation, which taking implied an obligation on the Government's part to make just compensation to the Sioux. That obligation, including an award of interest, must now be paid. The principles that it "must [be] presume[d] that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that [it] exercised its best judgment in the premises," *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568, are inapplicable in this case. The question whether a particular congressional measure was appropriate for protecting and advancing a tribe's interests, and therefore not subject to the Just Compensation Clause, is factual in nature, and the answer must be based on a consideration of all the evidence presented. While a reviewing court is not to second-guess a legislative judgment that a particular measure would serve the tribe's best interests, the court is required, in considering whether the measure was taken in pursuance of Congress' power to manage and control tribal lands for the Indians' welfare, to engage in a thorough and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry. Pp. 407–423.

220 Ct. Cl. 442, 601 F. 2d 1157, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Parts III and V of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 424. REHNQUIST, J., filed a dissenting opinion, *post*, p. 424.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, William Alsup, Dirk D. Snel,* and *Martin W. Matzen.*

Arthur Lazarus, Jr., argued the cause for respondents. With him on the brief were *Marvin J. Sonosky, Reid P. Chambers, Harry R. Sachse,* and *William Howard Payne.**

**Steven M. Tullberg* and *Robert T. Coulter* filed a brief for the Indian Law Resource Center as *amicus curiae.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866–1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.[1]

The Fort Laramie Treaty included several agreements central to the issues presented in this case. First, it established the Great Sioux Reservation, a tract of land bounded on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one

[1] The Sioux territory recognized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana. The Powder River War is described in some detail in D. Robinson, A History of the Dakota or Sioux Indians 356–381 (1904), reprinted in 2 South Dakota Historical Collections (1904). Red Cloud's career as a warrior and statesman of the Sioux is recounted in 2 G. Hebard & E. Brininstool, The Bozeman Trail 175–204 (1922).

hundred and fourth meridian of west longitude,[2] in addition to certain reservations already existing east of the Missouri. The United States "solemnly agree[d]" that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [this] territory." *Ibid.*

Second, the United States permitted members of the Sioux tribes to select lands within the reservation for cultivation. *Id.*, at 637. In order to assist the Sioux in becoming civilized farmers, the Government promised to provide them with the necessary services and materials, and with subsistence rations for four years. *Id.*, at 639.[3]

Third, in exchange for the benefits conferred by the treaty, the Sioux agreed to relinquish their rights under the Treaty of September 17, 1851, to occupy territories outside the reservation, while reserving their "right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase." *Ibid.* The Indians also expressly agreed to withdraw all opposition to the build-

[2] The boundaries of the reservation included approximately half the area of what is now the State of South Dakota, including all of that State west of the Missouri River save for a narrow strip in the far western portion. The reservation also included a narrow strip of land west of the Missouri and north of the border between North and South Dakota.

[3] The treaty called for the construction of schools and the provision of teachers for the education of Indian children, the provision of seeds and agricultural instruments to be used in the first four years of planting, and the provision of blacksmiths, carpenters, millers, and engineers to perform work on the reservation. See 15 Stat. 637–638, 640. In addition, the United States agreed to deliver certain articles of clothing to each Indian residing on the reservation, "on or before the first day of August of each year, for thirty years." *Id.*, at 638. An annual stipend of $10 per person was to be appropriated for all those members of the Sioux Nation who continued to engage in hunting; those who settled on the reservation to engage in farming would receive $20. *Ibid.* Subsistence rations of meat and flour (one pound of each per day) were to be provided for a period of four years to those Indians upon the reservation who could not provide for their own needs. *Id.*, at 639.

ing of railroads that did not pass over their reservation lands, not to engage in attacks on settlers, and to withdraw their opposition to the military posts and roads that had been established south of the North Platte River. *Ibid.*

Fourth, Art. XII of the treaty provided:

> "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same." *Ibid.*[4]

The years following the treaty brought relative peace to the Dakotas, an era of tranquility that was disturbed, however, by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver.[5] In 1874 the Army planned and undertook an exploratory expedition into the Hills, both for the purpose of establishing a military outpost from which to control those Sioux who had not accepted the terms of the Fort Laramie Treaty, and for the purpose of investigating "the country about which dreamy stories have been told." D. Jackson, Custer's Gold 14 (1966) (quoting the 1874 annual report of Lieutenant General Philip H. Sheridan, as Commander of the Military Division of the Missouri, to the Secretary of War). Lieutenant Colonel George Armstrong Custer led the expedition of close to 1,000 soldiers and teamsters, and a substantial number of military and civilian aides.

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[4] The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return." Robinson, *supra* n. 1, at 387.

[5] The history of speculation concerning the presence of gold in the Black Hills, which dated from early explorations by prospectors in the 1830's, is capsulized in D. Jackson, Custer's Gold 3–7 (1966).

Custer's journey began at Fort Abraham Lincoln on the Missouri River on July 2, 1874. By the end of that month they had reached the Black Hills, and by mid-August had confirmed the presence of gold fields in that region. The discovery of gold was widely reported in newspapers across the country.[6] Custer's florid descriptions of the mineral and timber resources of the Black Hills, and the land's suitability for grazing and cultivation, also received wide circulation, and had the effect of creating an intense popular demand for the "opening" of the Hills for settlement.[7] The only obstacle to "progress" was the Fort Laramie Treaty that reserved occupancy of the Hills to the Sioux.

Having promised the Sioux that the Black Hills were reserved to them, the United States Army was placed in the position of having to threaten military force, and occasionally to use it, to prevent prospectors and settlers from trespassing on lands reserved to the Indians. For example, in September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry, Commander of the Department of Dakota, at Saint Paul, directing him to use force to prevent companies of prospectors from trespassing on the Sioux Reservation. At the same time, Sheridan let it be known that

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[6] In 1974, the Center for Western Studies completed a project compiling contemporary newspaper accounts of Custer's expedition. See H. Krause & G. Olson, Prelude to Glory (1974). Several correspondents traveled with Custer on the expedition and their dispatches were published by newspapers both in the Midwest and the East. *Id.*, at 6.

[7] See Robinson, *supra* n. 1, at 408–410; A. Tallent, The Black Hills 130 (1975 reprint of 1899 ed.); J. Vaughn, The Reynolds Campaign on Powder River 3–4 (1961).

The Sioux regarded Custer's expedition in itself to be a violation of the Fort Laramie Treaty. In later negotiations for cession of the Black Hills, Custer's trail through the Hills was referred to by a chief known as Fast Bear as "that thieves' road." Jackson, *supra* n. 5, at 24. Chroniclers of the expedition, at least to an extent, have agreed. See *id.*, at 120; G. Manypenny, Our Indian Wards xxix, 296–297 (1972 reprint of 1880 ed.).

he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians." App. 62–63. Sheridan's instructions were published in local newspapers. See *id.*, at 63.[8]

Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory. In a letter dated November 9, 1875, to Terry, Sheridan reported that he had met with President Grant, the Secretary of the Interior, and the Secretary of War, and that the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners, "it being his belief that such resistance only increased their desire and complicated the troubles." *Id.*, at 59. These orders were to be enforced "quietly," *ibid.*, and the President's decision was to remain "confidential." *Id.*, at 59–60 (letter from Sheridan to Sherman).

With the Army's withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of settlers into the Black Hills increased. The Government concluded that the only practical course was to secure to the citizens of the United States the right to mine the Black Hills for gold. Toward

[8] General William Tecumseh Sherman, Commanding General of the Army, as quoted in the Saint Louis Globe in 1875, described the military's task in keeping prospectors out of the Black Hills as "the same old story, the story of Adam and Eve and the forbidden fruit." Jackson, *supra* n. 5, at 112. In an interview with a correspondent from the Bismarck Tribune, published September 2, 1874, Custer recognized the military's obligation to keep all trespassers off the reservation lands, but stated that he would recommend to Congress "the extinguishment of the Indian title at the earliest moment practicable for military reasons." Krause & Olson, *supra* n. 6, at 233. Given the ambivalence of feeling among the commanding officers of the Army about the practicality and desirability of its treaty obligations, it is perhaps not surprising that one chronicler of Sioux history would describe the Government's efforts to dislodge invading settlers from the Black Hills as "feeble." F. Hans, The Great Sioux Nation 522 (1964 reprint).

that end, the Secretary of the Interior, in the spring of 1875, appointed a commission to negotiate with the Sioux. The commission was headed by William B. Allison. The tribal leaders of the Sioux were aware of the mineral value of the Black Hills and refused to sell the land for a price less than $70 million. The commission offered the Indians an annual rental of $400,000, or payment of $6 million for absolute relinquishment of the Black Hills. The negotiations broke down.[9]

In the winter of 1875–1876, many of the Sioux were hunting in the unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty. On December 6, 1875, for reasons that are not entirely clear, the Commissioner of Indian Affairs sent instructions to the Indian agents on the reservation to notify those hunters that if they did not return to the reservation agencies by January 31, 1876, they would be treated as "hostiles." Given the severity of the winter, compliance with these instructions was impossible. On February 1, the Secretary of the Interior nonetheless relinquished jurisdiction over all hostile Sioux, including those Indians exercising their treaty-protected hunting rights, to the War Department. The Army's campaign against the "hostiles" led to Sitting Bull's notable victory over Custer's forces at the battle of the Little Big Horn on June 25. That victory, of course, was short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the Government.[10]

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[9] The Report of the Allison Commission to the Secretary of the Interior is contained in the Annual Report of the Commissioner of Indian Affairs (1875), App. 146, 158–195. The unsuccessful negotiations are described in some detail in Jackson, *supra* n. 5, at 116–118, and in Robinson, *supra* n. 1, at 416–421.

[10] These events are described by Manypenny, *supra* n. 7, at 294–321, and Robinson, *supra* n. 1, at 422–438.

In the meantime, Congress was becoming increasingly dissatisfied with the failure of the Sioux living on the reservation to become self-sufficient.[11] The Sioux' entitlement to subsistence rations under the terms of the Fort Laramie Treaty

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[11] In Dakota Twilight (1976), a history of the Standing Rock Sioux, Edward A. Milligan states:

"Nearly seven years had elapsed since the signing of the Fort Laramie Treaty and still the Sioux were no closer to a condition of self-support than when the treaty was signed. In the meantime the government had expended nearly thirteen million dollars for their support. The future treatment of the Sioux became a matter of serious moment, even if viewed from no higher standard than that of economics." *Id.*, at 52.

One historian has described the ration provisions of the Fort Laramie Treaty as part of a broader reservation system designed by Congress to convert nomadic tribesmen into farmers. Hagan, The Reservation Policy: Too Little and Too Late, in Indian-White Relations: A Persistent Paradox 157–169 (J. Smith & R. Kvasnicka, eds., 1976). In words applicable to conditions on the Sioux Reservation during the years in question, Professor Hagan stated:

"The idea had been to supplement the food the Indians obtained by hunting until they could subsist completely by farming. Clauses in the treaties permitted hunting outside the strict boundaries of the reservations, but the inevitable clashes between off-reservation hunting parties and whites led this privilege to be first restricted and then eliminated. The Indians became dependent upon government rations more quickly than had been anticipated, while their conversion to agriculture lagged behind schedule.

"The quantity of food supplied by the government was never sufficient for a full ration, and the quality was frequently poor. But in view of the fact that most treaties carried no provision for rations at all, and for others they were limited to four years, the members of Congress tended to look upon rations as a gratuity that should be terminated as quickly as possible. The Indian Service and military personnel generally agreed that it was better to feed than to fight, but to the typical late nineteenth-century member of Congress, not yet exposed to doctrines of social welfare, there was something obscene about grown men and women drawing free rations. Appropriations for subsistence consequently fell below the levels requested by the secretary of the interior.

"That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest." *Id.*, at 161 (footnotes omitted).

had expired in 1872. Nonetheless, in each of the two following years, over $1 million was appropriated for feeding the Sioux. In August 1876, Congress enacted an appropriations bill providing that "hereafter there shall be no appropriation made for the subsistence" of the Sioux, unless they first relinquished their rights to the hunting grounds outside the reservation, ceded the Black Hills to the United States, and reached some accommodation with the Government that would be calculated to enable them to become self-supporting. Act of Aug. 15, 1876, 19 Stat. 176, 192.[12] Toward this end, Congress requested the President to appoint another commission to negotiate with the Sioux for the cession of the Black Hills.

This commission, headed by George Manypenny, arrived in the Sioux country in early September and commenced meetings with the head men of the various tribes. The members of the commission impressed upon the Indians that the United States no longer had any obligation to provide them with subsistence rations. The commissioners brought with them the text of a treaty that had been prepared in advance. The principal provisions of this treaty were that the Sioux would relinquish their rights to the Black Hills and other lands west of the one hundred and third meridian, and their rights to hunt in the unceded territories to the north, in exchange for subsistence rations for as long as they would be needed to ensure the Sioux' survival. In setting out to obtain the tribes' agreement to this treaty, the commission ignored the stipulation of the Fort Laramie Treaty that any cession of the lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males. Instead, the treaty was presented just to Sioux

[12] The chronology of the enactment of this bill does not necessarily support the view that it was passed in reaction to Custer's defeat at the Battle of the Little Big Horn on June 25, 1876, although some historians have taken a contrary view. See Jackson, *supra* n. 5, at 119.

chiefs and their leading men. It was signed by only 10% of the adult male Sioux population.[13]

Congress resolved the impasse by enacting the 1876 "agreement" into law as the Act of Feb. 28, 1877 (1877 Act). 19 Stat. 254. The Act had the effect of abrogating the earlier Fort Laramie Treaty, and of implementing the terms

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[13] The commission's negotiations with the chiefs and head men is described by Robinson, *supra* n. 1, at 439–442. He states:

"As will be readily understood, the making of a treaty was a forced put, so far as the Indians were concerned. Defeated, disarmed, dismounted, they were at the mercy of a superior power and there was no alternative but to accept the conditions imposed upon them. This they did with as good grace as possible under all of the conditions existing." *Id.*, at 442.

Another early chronicler of the Black Hills region wrote of the treaty's provisions in the following chauvinistic terms:

"It will be seen by studying the provisions of this treaty, that by its terms the Indians from a material standpoint lost much, and gained but little. By the first article they lose all rights to the unceded Indian territory in Wyoming from which white settlers had then before been altogether excluded; by the second they relinquish all right to the Black Hills, and the fertile valley of the Belle Fourche in Dakota, without additional material compensation; by the third conceding the right of way over the unceded portions of their reservation; by the fourth they receive such supplies only, as were provided by the treaty of 1868, restricted as to the points for receiving them. The only real gain to the Indians seems to be embodied in the fifth article of the treaty [Government's obligation to provide subsistence rations]. The Indians, doubtless, realized that the Black Hills was destined soon to slip out of their grasp, regardless of their claims, and therefore thought it best to yield to the inevitable, and accept whatever was offered them.

"They were assured of a continuance of their regular daily rations, and certain annuities in clothing each year, guaranteed by the treaty of 1868, and what more could they ask or desire, than that a living be provided for themselves, their wives, their children, and all their relations, including squaw men, indirectly, thus leaving them free to live their wild, careless, unrestrained life, exempt from all the burdens and responsibilities of civilized existence? In view of the fact that there are thousands who are obliged to earn their bread and butter by the sweat of their brows, and that have hard work to keep the wolf from the door, they should be satisfied." Tallent, *supra* n. 7, at 133–134.

of the Manypenny Commission's "agreement" with the Sioux leaders.[14]

The passage of the 1877 Act legitimized the settlers' invasion of the Black Hills, but throughout the years it has been regarded by the Sioux as a breach of this Nation's solemn obligation to reserve the Hills in perpetuity for occupation by the Indians. One historian of the Sioux Nation commented on Indian reaction to the Act in the following words:

> "The Sioux thus affected have not gotten over talking about that treaty yet, and during the last few years they have maintained an organization called the Black Hills Treaty Association, which holds meetings each year at the various agencies for the purpose of studying the

[14] The 1877 Act "ratified and confirmed" the agreement reached by the Manypenny Commission with the Sioux tribes. 19 Stat. 254. It altered the boundaries of the Great Sioux Reservation by adding some 900,000 acres of land to the north, while carving out virtually all that portion of the reservation between the one hundred and third and one hundred and fourth meridians, including the Black Hills, an area of well over 7 million acres. The Indians also relinquished their rights to hunt in the unceded lands recognized by the Fort Laramie Treaty, and agreed that three wagon roads could be cut through their reservation. *Id.*, at 255.

In exchange, the Government reaffirmed its obligation to provide all annuities called for by the Fort Laramie Treaty, and "to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." *Id.*, at 256. In addition, every individual was to receive fixed quantities of beef or bacon and flour, and other foodstuffs, in the discretion of the Commissioner of Indian Affairs, which "shall be continued until the Indians are able to support themselves." *Ibid.* The provision of rations was to be conditioned, however, on the attendance at school by Indian children, and on the labor of those who resided on lands suitable for farming. The Government also promised to assist the Sioux in finding markets for their crops and in obtaining employment in the performance of Government work on the reservation. *Ibid.*

Later congressional actions having the effect of further reducing the domain of the Great Sioux Reservation are described in *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 589 (1977).

> treaty with the intention of presenting a claim against the government for additional reimbursements for the territory ceded under it. Some think that Uncle Sam owes them about $9,000,000 on the deal, but it will probably be a hard matter to prove it." F. Fiske, The Taming of the Sioux 132 (1917).

Fiske's words were to prove prophetic.

II

Prior to 1946, Congress had not enacted any mechanism of general applicability by which Indian tribes could litigate treaty claims against the United States.[15] The Sioux, however, after years of lobbying, succeeded in obtaining from Congress the passage of a special jurisdictional Act which provided them a forum for adjudication of all claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof." Act of June 3, 1920, ch. 222, 41 Stat. 738. Pursuant to this statute, the Sioux, in 1923, filed a petition with the Court of Claims alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. This claim was dismissed by that court in 1942. In a lengthy and unanimous opinion, the court concluded that it was not authorized by the Act of June 3, 1920, to question whether the compensation afforded the Sioux by Congress in 1877 was an adequate price for the Black Hills, and that the Sioux' claim in this regard was a moral claim not protected by the Just Compensation Clause. *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943).

In 1946, Congress passed the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.*, creating a new forum to hear and determine all tribal grievances that had

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[15] See § 9 of the Act of Mar. 3, 1863, 12 Stat. 767; § 1 of the Tucker Act of Mar. 3, 1887, 24 Stat. 505.

arisen previously. In 1950, counsel for the Sioux resubmitted the Black Hills claim to the Indian Claims Commission. The Commission initially ruled that the Sioux had failed to prove their case. *Sioux Tribe* v. *United States*, 2 Ind. Cl. Comm'n 646 (1954), aff'd, 146 F. Supp. 229 (Ct. Cl. 1956). The Sioux filed a motion with the Court of Claims to vacate its judgment of affirmance, alleging that the Commission's decision had been based on a record that was inadequate, due to the failings of the Sioux' former counsel. This motion was granted and the Court of Claims directed the Commission to consider whether the case should be reopened for the presentation of additional evidence. On November 19, 1958, the Commission entered an order reopening the case and announcing that it would reconsider its prior judgment on the merits of the Sioux claim. App. 265–266; see *Sioux Tribe* v. *United States*, 182 Ct. Cl. 912 (1968) (summary of proceedings).

Following the Sioux' filing of an amended petition, claiming again that the 1877 Act constituted a taking of the Black Hills for which just compensation had not been paid, there ensued a lengthy period of procedural sparring between the Indians and the Government. Finally, in October 1968, the Commission set down three questions for briefing and determination: (1) What land and rights did the United States acquire from the Sioux by the 1877 Act? (2) What, if any, consideration was given for that land and those rights? And (3) if there was no consideration for the Government's acquisition of the land and rights under the 1877 Act, was there any payment for such acquisition? App. 266.

Six years later, by a 4-to-1 vote, the Commission reached a preliminary decision on these questions. *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm'n 151 (1974). The Commission first held that the 1942 Court of Claims decision did not bar the Sioux' Fifth Amendment taking claim through application of the doctrine of res judicata. The Commission concluded that the Court of Claims had dismissed the earlier

suit for lack of jurisdiction, and that it had not determined the merits of the Black Hills claim. The Commission then went on to find that Congress, in 1877, had made no effort to give the Sioux full value for the ceded reservation lands. The only new obligation assumed by the Government in exchange for the Black Hills was its promise to provide the Sioux with subsistence rations, an obligation that was subject to several limiting conditions. See n. 14, *supra*. Under these circumstances, the Commission concluded that the consideration given the Indians in the 1877 Act had no relationship to the value of the property acquired. Moreover, there was no indication in the record that Congress ever attempted to relate the value of the rations to the value of the Black Hills Applying the principles announced by the Court of Claims in *Three Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), the Commission concluded that Congress had acted pursuant to its power of eminent domain when it passed the 1877 Act, rather than as a trustee for the Sioux, and that the Government must pay the Indians just compensation for the taking of the Black Hills.[16]

The Government filed an appeal with the Court of Claims

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[16] The Commission determined that the fair market value of the Black Hills as of February 28, 1877, was $17.1 million. In addition, the United States was held liable for gold removed by trespassing prospectors prior to that date, with a fair market value in the ground of $450,000. The Commission determined that the Government should receive a credit for all amounts it had paid to the Indians over the years in compliance with its obligations under the 1877 Act. These amounts were to be credited against the fair market value of the lands and gold taken, and interest as it accrued. The Commission decided that further proceedings would be necessary to compute the amounts to be credited and the value of the rights-of-way across the reservation that the Government also had acquired through the 1877 Act.

Chairman Kuykendall dissented in part from the Commission's judgment, arguing that the Sioux' taking claim was barred by the res judicata effect of the 1942 Court of Claims decision.

from the Commission's interlocutory order, arguing alternatively that the Sioux' Fifth Amendment claim should have been barred by principles of res judicata and collateral estoppel, or that the 1877 Act did not effect a taking of the Black Hills for which just compensation was due. Without reaching the merits, the Court of Claims held that the Black Hills claim was barred by the res judicata effect of its 1942 decision. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F. 2d 1298 (1975). The court's majority recognized that the practical impact of the question presented was limited to a determination of whether or not an award of interest would be available to the Indians. This followed from the Government's failure to appeal the Commission's holding that it had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages, without interest, under § 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U. S. C. § 70a (5). Only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. 207 Ct. Cl., at 237, 518 F. 2d, at 1299.[17]

[17] See *United States* v. *Tillamooks*, 341 U. S. 48, 49 (1951) (recognizing that the "traditional rule" is that interest is not to be awarded on claims against the United States absent an express statutory provision to the contrary and that the "only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment"). In *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938), the Court stated: "The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, *i. e.*, value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

The Court of Claims also noted that subsequent to the Indian Claims Commission's judgment, Congress had enacted an amendment to 25 U. S. C. § 70a, providing generally that expenditures made by the Government "for food, rations, or provisions shall not be deemed payments on the claim." Act of Oct. 27, 1974, § 2, 88 Stat. 1499. Thus, the Government would no longer be entitled to an offset from any judgment eventually awarded the Sioux based on its appropriations for subsistence rations

The court affirmed the Commission's holding that a want of fair and honorable dealings in this case was evidenced, and held that the Sioux thus would be entitled to an award of at least $17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to passage of the 1877 Act. See n. 16, *supra*. The court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills. The court concluded: "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe." 207 Ct. Cl., at 241, 518 F. 2d, at 1302.

Nonetheless, the court held that the merits of the Sioux' taking claim had been reached in 1942, and whether resolved "rightly or wrongly," *id.*, at 249, 518 F. 2d, at 1306, the claim was now barred by res judicata. The court observed that interest could not be awarded the Sioux on judgments obtained pursuant to the Indian Claims Commission Act, and that while Congress could correct this situation, the court could not. *Ibid.*[18] The Sioux petitioned this Court for a writ of certiorari, but that petition was denied. 423 U. S. 1016 (1975).

The case returned to the Indian Claims Commission, where the value of the rights-of-way obtained by the Government through the 1877 Act was determined to be $3,484, and where it was decided that the Government had made no payments to the Sioux that could be considered as offsets. App. 316.

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in the years following the passage of the 1877 Act. 207 Ct. Cl., at 240, 518 F. 2d, at 1301. See n. 16, *supra*.

[18] Judge Davis dissented with respect to the court's holding on res judicata, arguing that the Sioux had not had the opportunity to present their claim fully in 1942. 207 Ct. Cl., at 249, 518 F. 2d, at 1306.

The Government then moved the Commission to enter a final award in favor of the Sioux in the amount of $17.5 million, see n. 16, *supra*, but the Commission deferred entry of final judgment in view of legislation then pending in Congress that dealt with the case.

On March 13, 1978, Congress passed a statute providing for Court of Claims review of the merits of the Indian Claims Commission's judgment that the 1877 Act effected a taking of the Black Hills, without regard to the defenses of res judicata and collateral estoppel. The statute authorized the Court of Claims to take new evidence in the case, and to conduct its review of the merits *de novo*. Pub. L. 95–243, 92 Stat. 153, amending § 20 (b) of the Indian Claims Commission Act. See 25 U. S. C. § 70s (b) (1976 ed., Supp. II).

Acting pursuant to that statute, a majority of the Court of Claims, sitting en banc, in an opinion by Chief Judge Friedman, affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills and of rights-of-way across the reservation. 220 Ct. Cl. 442, 601 F. 2d 1157 (1979).[19] In doing so, the court applied the test it had earlier articulated in *Fort Berthold*, 182 Ct. Cl., at 553, 390 F. 2d, at 691, asking whether Congress had made "a good faith effort to give the Indians the full value of the land," 220 Ct. Cl., at 452, 601 F. 2d, at 1162, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property. The court characterized the Act as a taking, an exercise of Congress' power of eminent domain over Indian property. It distinguished broad statements seemingly leading to a contrary

[19] While affirming the Indian Claims Commission's determination that the acquisition of the Black Hills and the rights-of-way across the reservation constituted takings, the court reversed the Commission's determination that the mining of gold from the Black Hills by prospectors prior to 1877 also constituted a taking. The value of the gold, therefore, could not be considered as part of the principal on which interest would be paid to the Sioux. 220 Ct. Cl., at 466–467, 601 F. 2d, at 1171–1172.

result in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), as inapplicable to a case involving a claim for just compensation. 220 Ct. Cl., at 465, 601 F. 2d, at 1170.[20]

The court thus held that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of $17.1 million, dating from 1877.[21]

We granted the Government's petition for a writ of certiorari, 444 U. S. 989 (1979), in order to review the important constitutional questions presented by this case, questions not only of longstanding concern to the Sioux, but also of significant economic import to the Government.

III

Having twice denied petitions for certiorari in this litigation, see 318 U. S. 789 (1943); 423 U. S. 1016 (1975), we are confronted with it for a third time as a result of the amendment, above noted, to the Indian Claims Commission Act of 1946, 25 U. S. C. § 70s (b) (1976 ed., Supp. II), which

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[20] The *Lone Wolf* decision itself involved an action by tribal leaders to enjoin the enforcement of a statute that had the effect of abrogating the provisions of an earlier-enacted treaty with an Indian tribe. See Part IV–B, *infra*.

[21] Judge Nichols concurred in the result, and all of the court's opinion except that portion distinguishing *Lone Wolf*. He would have held *Lone Wolf*'s principles inapplicable to this case because Congress had not created a record showing that it had considered the compensation afforded the Sioux under the 1877 Act to be adequate consideration for the Black Hills. He did not believe that *Lone Wolf* could be distinguished on the ground that it involved an action for injunctive relief rather than a claim for just compensation. 220 Ct. Cl., at 474–475, 601 F. 2d, at 1175–1176.

Judge Bennett, joined by Judge Kunzig, dissented. The dissenters would have read *Lone Wolf* broadly to hold that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation given. "The law we should apply is that once Congress has, through negotiation or statute, recognized the Indian tribes' rights in the property, has disposed of it, and has given value to the Indians for it, that is the end of the matter." 220 Ct. Cl., at 486, 601 F. 2d, at 1182.

directed the Court of Claims to review the merits of the Black Hills takings claim without regard to the defense of res judicata. The amendment, approved March 13, 1978, provides:

> "Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo." 92 Stat. 153.

Before turning to the merits of the Court of Claims' conclusion that the 1877 Act effected a taking of the Black Hills, we must consider the question whether Congress, in enacting this 1978 amendment, "has inadvertently passed the limit which separates the legislative from the judicial power." *United States* v. *Klein*, 13 Wall. 128, 147 (1872).

A

There are two objections that might be raised to the constitutionality of this amendment, each framed in terms of the doctrine of separation of powers. The first would be that Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions. See *Hayburn's Case*, 2 Dall. 409, 410–414 (1792) (setting forth the views of three Circuit Courts, including among their complements Mr. Chief

Justice Jay, and Justices Cushing, Wilson, Blair, and Iredell, that the Act of Mar. 23, 1792, 1 Stat. 243, was unconstitutional because it subjected the decisions of the Circuit Courts concerning eligibility for pension benefits to review by the Secretary of War and the Congress). The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, effectively reviewed and reversed that court's 1975 judgment that the claim was barred by res judicata, or its 1942 judgment that the claim was not cognizable under the Fifth Amendment. Such legislative review of a judicial decision would interfere with the independent functions of the Judiciary.

The second objection would be that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left the court no adjudicatory function to perform. See *United States* v. *Klein*, 13 Wall., at 146; *Yakus* v. *United States*, 321 U. S. 414, 467–468 (1944) (Rutledge, J., dissenting). Of course, in the context of this amendment, that objection would have to be framed in terms of Congress' removal of a single issue from the Court of Claims' purview, the question whether res judicata or collateral estoppel barred the Sioux' claim. For in passing the amendment, Congress left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law. See n. 23, *infra*.

These objections to the constitutionality of the amendment were not raised by the Government before the Court of Claims. At oral argument in this Court, counsel for the United States, upon explicit questioning, advanced the position that the amendment was not beyond the limits of legislative power.[22] The question whether the amendment

[22] In response to a question from the bench, Government counsel stated: "I think Congress is entitled to say, 'You may have another opportunity to litigate your lawsuit.'" Tr. of Oral Arg. 20.

impermissibly interfered with judicial power was debated, however, in the House of Representatives, and that body concluded that the Government's waiver of a "technical legal defense" in order to permit the Court of Claims to reconsider the merits of the Black Hills claim was within Congress' power to enact.[23]

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[23] Representative Gudger of North Carolina persistently argued the view that the amendment unconstitutionally interfered with the powers of the Judiciary. He dissented from the Committee Report in support of the amendment's enactment, stating:

"I do not feel that when the Federal Judiciary has adjudicated a matter through appellate review and no error has been found by the Supreme Court of the United States in the application by the lower court (in this instance the Court of Claims) of the doctrine of res judicata or collateral estoppel that the Congress of the United States should enact legislation which has the effect of reversing the decision of the Judiciary." H. R. Rep. No. 95–529, p. 17 (1977).

Representative Gudger stated that he could support a bill to grant a special appropriation to the Sioux Nation, acknowledging that it was for the purpose of extinguishing Congress' moral obligation arising from the Black Hills claim, "but I cannot justify in my own mind this exercise of congressional review of a judicial decision which I consider contravenes our exclusively legislative responsibility under the separation of powers doctrine." *Id.*, at 18.

The Congressman, in the House debates, elaborated upon his views on the constitutionality of the amendment. He stated that the amendment would create "a real and serious departure from the separation-of-powers doctrine, which I think should continue to govern us and has governed us in the past." 124 Cong. Rec. 2953 (1978). He continued:

"I submit that this bill has the precise and exact effect of reversing a decision of the Court of Claims which has heretofore been sustained by the Supreme Court of the United States. Thus, it places the Congress of the United States in the position of reviewing and reversing a judicial decision in direct violation of the separation-of-powers doctrine so basic to our tripartite form of government.

"I call to your attention that, in this instance, we are not asked to change the law, applicable uniformly to all cases of like nature throughout the land, but that this bill proposes to change the application of the law with respect to one case only. In doing this, we are not legislating, we are adjudicating. Moreover, we are performing the adjudicatory func-

The question debated on the floor of the House is one the answer to which is not immediately apparent. It requires us to examine the proper role of Congress and the courts in

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tion with respect to a case on which the Supreme Court of the United States has acted. Thus, in this instance, we propose to reverse the decision of the Supreme Court of our land." *Ibid.*

Representative Gudger's views on the effect of the amendment vis-à-vis the independent powers of the Judiciary were not shared by his colleagues. Representative Roncalio stated:

"I want to emphasize that the bill does not make a congressional determination of whether or not the United States violated the fifth amendment. It does not say that the Sioux are entitled to the interest on the $17,500,000 award. It says that the court will review the facts and law in the case and determine that question." *Id.*, at 2954.

Representative Roncalio also informed the House that Congress in the past had enacted legislation waiving the defense of res judicata in private claims cases, and had done so twice with respect to Indian claims. *Ibid.* He mentioned the Act of Mar. 3, 1881, 21 Stat. 504 (which actually waived the effect of a prior award made to the Choctaw Nation by the Senate), and the Act of Feb. 7, 1925, 43 Stat. 812 (authorizing the Court of Claims and the Supreme Court to consider claims of the Delaware Tribe "de novo, upon a legal and equitable basis, and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"). Both those enactments were also brought to the attention of a Senate Subcommittee in hearings on this amendment conducted during the previous legislative session. See Hearing on S. 2780 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., 16–17 (1976) (letter from Morris Thompson, Commissioner of Indian Affairs). The enactments referred to by Representative Roncalio were construed, respectively, in *Choctaw Nation* v. *United States*, 119 U. S. 1, 29–32 (1886), and *Delaware Tribe* v. *United States*, 74 Ct. Cl. 368 (1932).

Representative Pressler also responded to Representative Gudger's interpretation of the proposed amendment, arguing that "[w]e are, indeed, here asking for a review and providing the groundwork for a review. I do not believe that we would be reviewing a decision; indeed, the same decision might be reached." 124 Cong. Rec. 2955 (1978). Earlier, Representative Meeds clearly had articulated the prevailing congressional view on the effect of the proposed amendment. After summarizing the history of the Black Hills litigation, he stated:

"I go through that rather complicated history for the purpose of point-

recognizing and determining claims against the United States, in light of more general principles concerning the legislative and judicial roles in our tripartite system of government. Our examination of the amendment's effect, and of this Court's precedents, leads us to conclude that neither of the two separation-of-powers objections described above is presented by this legislation.

B

Our starting point is *Cherokee Nation* v. *United States,* 270 U. S. 476 (1926). That decision concerned the Special Act of Congress, dated March 3, 1919, 40 Stat. 1316, conferring jurisdiction upon the Court of Claims "to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five." In the judgment referred to by the Act, the Court of Claims had allowed 5% simple interest on four Cherokee claims, to accrue from the date of liability. *Cherokee Nation* v. *United States,* 40 Ct. Cl. 252 (1905). This Court had affirmed that judgment, including the interest award. *United States* v. *Cherokee Nation,* 202 U. S. 101,

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ing out to the Members that the purpose of this legislation is not to decide the matter on the merits. That is still for the court to do. The purpose of this legislation is only to waive the defense of res judicata and to waive this technical defense, as we have done in a number of other instances in this body, so this most important claim can get before the courts again and can be decided without a technical defense and on the merits." *Id.,* at 2388.

See also S. Rep. No. 95–112, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain legal prohibitions so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum"); H. R. Rep. No. 95–529, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain technical legal defenses so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum").

123–126 (1906). Thereafter, and following payment of the judgment, the Cherokee presented to Congress a new claim that they were entitled to compound interest on the lump sum of principal and interest that had accrued up to 1895. It was this claim that prompted Congress, in 1919, to reconfer jurisdiction on the Court of Claims to consider the Cherokee's entitlement to that additional interest.

Ultimately, this Court held that the Cherokee were not entitled to the payment of compound interest on the original judgment awarded by the Court of Claims. 270 U. S., at 487-496. Before turning to the merits of the interest claim, however, the Court considered "the effect of the Act of 1919 in referring the issue in this case to the Court of Claims." *Id.*, at 485–486. The Court's conclusion concerning that question bears close examination:

> "The judgment of this Court in the suit by the Cherokee Nation against the United States, in April, 1906 (202 U. S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata*. In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata*, and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General, representing the Government, properly concedes this to be the correct view. *The power of Congress to waive such an adjudication of course is clear.*" *Id.*, at 486 (last emphasis supplied).

The holding in *Cherokee Nation* that Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States is dispositive of the question considered here. Moreover, that holding is consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and "to pay the Debts . . . of the United States." U. S. Const., Art. I, § 8, cl. 1. That precedent speaks directly to the separation-of-powers objections discussed above.

The scope of Congress' power to pay the Nation's debts seems first to have been construed by this Court in *United States* v. *Realty Co.*, 163 U. S. 427 (1896). There, the Court stated:

> "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded." *Id.*, at 440.

Other decisions clearly establish that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States, as Congress did in this case and in *Cherokee Nation*. Although the Court in *Cherokee Nation* did not expressly tie its conclusion that Congress had the power to waive the res judicata effect of a judgment in favor of the United States to Congress' consti-

tutional power to pay the Nation's debts, the *Cherokee Nation* opinion did rely on the decision in *Nock* v. *United States*, 2 Ct. Cl. 451 (1867). See 270 U. S., at 486.

In *Nock*, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damages claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the effect of setting aside the court's prior judgment. Rather, the court concluded:

> "It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially;* neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct. Cl., at 457–458 (emphases in original).

The *Nock* court thus expressly rejected the applicability of separation-of-powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.[24]

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[24] The joint resolution at issue in *Nock* also limited the amount of the judgment that the Court of Claims could award Nock to a sum that had

The principles set forth in *Cherokee Nation* and *Nock* were substantially reaffirmed by this Court in *Pope* v. *United States*, 323 U. S. 1 (1944). There Congress had enacted special legislation conferring jurisdiction upon the Court of

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been established in a report of the Solicitor of the Treasury to the Senate. See 14 Stat. 608. The court rejected the Government's argument that the Constitution had not vested in Congress "such discretion to fetter or circumscribe the course of justice." See 2 Ct. Cl., at 455. The court reasoned that this limitation on the amount of the claimant's recovery was a valid exercise of Congress' power to condition waivers of the sovereign immunity of the United States. "[I]t would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first." *Id.*, at 458.

Just because we have addressed our attention to the ancient Court of Claims' decision in *Nock*, it should not be inferred that legislative action of the type at issue here is a remnant of the far-distant past. Special jurisdictional Acts waiving affirmative defenses of the United States to legal claims, and directing the Court of Claims to resolve the merits of those claims, are legion. See *Mizokami* v. *United States*, 188 Ct. Cl. 736, 740–741, and nn. 1 and 2, 414 F. 2d 1375, 1377, and nn. 1 and 2 (1969) (collecting cases). A list of cases, in addition to those discussed in the text, that have recognized or acted upon Congress' power to waive the defense of res judicata to claims against the United States follows (the list is not intended to be exhaustive): *United States* v. *Grant*, 110 U. S. 225 (1884); *Lamborn & Co.* v. *United States*, 106 Ct. Cl. 703, 724–728, 65 F. Supp. 569, 576–578 (1946); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19 (1944); *Richardson* v. *United States*, 81 Ct. Cl. 948, 956–957 (1935); *Delaware Tribe* v. *United States*, 74 Ct. Cl. 368 (1932); *Garrett* v. *United States*, 70 Ct. Cl. 304, 310–312 (1930).

In *Richardson*, the Court of Claims observed:

"The power of Congress by special act to waive any defense, either legal or equitable, which the Government may have to a suit in this court, as it did in the *Nock* and *Cherokee Nation cases*, has never been questioned. The reports of the court are replete with cases where Congress, impressed with the equitable justice of claims which have been rejected by the court on legal grounds, has, by special act, waived defenses of the Government which prevented recovery and conferred jurisdiction on the court to again adjudicate the case. In such instances the court proceeded in conformity with the provisions of the act of reference and in cases, too numerous for

Claims, "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon" certain claims against the United States arising out of a construction contract. Special Act of Feb. 27, 1942, § 1, 56 Stat. 1122. The court was also directed to determine Pope's claims and render judgment upon them according to a particular formula for measuring the value of the work that he had performed. The Court of Claims construed the Special Act as deciding the questions of law presented by the case, and leaving it the role merely of computing the amount of the judgment for the claimant according to a mathematical formula. *Pope* v. *United States*, 100 Ct. Cl. 375, 379–380, 53 F. Supp 570, 571–572 (1944). Based upon that reading of the Act, and this Court's decision in *United States* v. *Klein*, 13 Wall. 128 (1872) (see discussion *infra*, at 402–405), the Court of Claims held that the Act unconstitutionally interfered with judicial independence. 100 Ct. Cl., at 380–382, 53 F. Supp., at 572–573. It distinguished *Cherokee Nation* as a case in which Congress granted a claimant a new trial, without directing the courts how to decide the case. 100 Ct. Cl., at 387, and n. 5, 53 F. Supp., at 575, and n. 5.

This Court reversed the Court of Claims' judgment. In

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citation here, awarded judgments to claimants whose claims had previously been rejected." 81 Ct. Cl., at 957.

Two similar decisions by the United States Court of Appeals for the Eighth Circuit are of interest. Both involved the constitutionality of a joint resolution that set aside dismissals of actions brought under the World War Veterans' Act, 1924, 38 U. S. C. § 445 (1952 ed.), and authorized the reinstatement of those war-risk insurance disability claims. The Court of Appeals found no constitutional prohibition against a congressional waiver of an adjudication in the Government's favor, or against conferring upon claimants against the United States the right to have their cases heard again on the merits. See *James* v. *United States*, 87 F. 2d 897, 898 (1937); *United States* v. *Hossmann*, 84 F. 2d 808, 810 (1936). The court relied, in part, on the holding in *Cherokee Nation*, and the sovereign immunity rationale applied in *Nock*.

doing so, the Court differed with the Court of Claims' interpretation of the effect of the Special Act. First, the Court held that the Act did not disturb the earlier judgment denying Pope's claim for damages. "While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before." 323 U. S., at 9. Second, the Court held that Congress' recognition of Pope's claim was within its power to pay the Nation's debts, and that its use of the Court of Claims as an instrument for exercising that power did not impermissibly invade the judicial function:

> "We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. . . . *United States* v. *Realty Co.*, 163 U. S. 427. . . . Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. [Footnote citing *Nock* and other cases omitted.] Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly. . . . See *Cherokee Nation* v. *United States*, 270 U. S. 476, 486." *Id.*, at 9–10.

In explaining its holding that the Special Act did not invade the judicial province of the Court of Claims by directing it to reach its judgment with reference to a specified formula, the Court stressed that Pope was required to pursue his claim in the usual manner, that the earlier factual findings made by the Court of Claims were not necessarily rendered conclusive by the Act, and that, even if Congress had stipulated to the facts, it was still a judicial function for the Court of Claims to render judgment on consent. *Id.*, at 10–12.

To be sure, the Court in *Pope* specifically declined to consider "just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside the judgment of the Court of Claims in favor of the Government and to require relitigation of the suit." *Id.*, at 8–9. The case before us might be viewed as presenting that question. We conclude, however, that the separation-of-powers question presented in this case has already been answered in *Cherokee Nation*, and that that answer is completely consistent with the principles articulated in *Klein*.

The decision in *United States* v. *Klein*, 13 Wall. 128 (1872), arose from the following facts: Klein was the administrator of the estate of V. F. Wilson, the deceased owner of property that had been sold by agents of the Government during the War Between the States. Klein sued the United States in the Court of Claims for the proceeds of that sale. His lawsuit was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820, which afforded such a cause of action to noncombatant property owners upon proof that they had "never given any aid or comfort to the present rebellion." Following the enactment of this legislation, President Lincoln had issued a proclamation granting "a full pardon" to certain persons engaged "in the existing rebellion" who desired to resume their allegiance to the Government, upon the condition that they take and maintain a prescribed

oath. This pardon was to have the effect of restoring those persons' property rights. See 13 Stat. 737. The Court of Claims held that Wilson's taking of the amnesty oath had cured his participation in "the . . . rebellion," and that his administrator, Klein, was thus entitled to the proceeds of the sale. *Wilson* v. *United States*, 4 Ct. Cl. 559 (1869).

The Court of Claims' decision in Klein's case was consistent with this Court's later decision in a similar case, *United States* v. *Padelford*, 9 Wall. 531 (1870), holding that the Presidential pardon purged a participant "of whatever offence against the laws of the United States he had committed . . . and relieved [him] from any penalty which he might have incurred." *Id.*, at 543. Following the Court's announcement of the judgment in *Padelford*, however, Congress enacted a proviso to the appropriations bill for the Court of Claims. The proviso had three effects: First, no Presidential pardon or amnesty was to be admissible in evidence on behalf of a claimant in the Court of Claims as the proof of loyalty required by the Abandoned and Captured Property Act. Second, the Supreme Court was to dismiss, for want of jurisdiction, any appeal from a judgment of the Court of Claims in favor of a claimant who had established his loyalty through a pardon. Third, the Court of Claims henceforth was to treat a claimant's receipt of a Presidential pardon, without protest, as conclusive evidence that he had given aid and comfort to the rebellion, and to dismiss any lawsuit on his behalf for want of jurisdiction. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

The Government's appeal from the judgment in Klein's case was decided by this Court following the enactment of the appropriations proviso. This Court held the proviso unconstitutional notwithstanding Congress' recognized power "to make 'such exceptions from the appellate jurisdiction' [of the Supreme Court] as should seem to it expedient." 13 Wall., at 145. See U. S. Const., Art. III, § 2, cl. 2. This

holding followed from the Court's interpretation of the proviso's effect:

> "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 13 Wall., at 145.

Thus construed, the proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor.

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?
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> . . . . .
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> ". . . Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.*, at 146–147.

Second, the rule prescribed by the proviso "is also liable to just exception as impairing the effect of a pardon, and thus

infringing the constitutional power of the Executive." *Id.*, at 147. The Court held that it would not serve as an instrument toward the legislative end of changing the effect of a Presidential pardon. *Id.*, at 148.

It was, of course, the former constitutional objection held applicable to the legislative proviso in *Klein* that the Court was concerned about in *Pope*. But that objection is not applicable to the case before us for two reasons. First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action could not be grounded upon its broad power to recognize and pay the Nation's debts. Second, and even more important, the proviso at issue in *Klein* had attempted "to prescribe a rule for the decision of a cause in a particular way." 13 Wall., at 146. The amendment at issue in the present case, however, like the Special Act at issue in *Cherokee Nation*, waived the defense of res judicata so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims' ultimate decision of that claim. See n. 23, *supra*.[25]

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[25] Before completing our analysis of this Court's precedents in this area, we turn to the question whether the holdings in *Cherokee Nation*, *Nock*, and *Pope*, might have been based on views, once held by this Court, that the Court of Claims was not, in all respects, an Art. III court, and that claims against the United States were not within Art. III's extension of "judicial Power" "to Controversies to which the United States shall be a Party." U. S. Const., Art. III, § 2, cl. 1. See *Williams* v. *United States*, 289 U. S. 553 (1933).

Pope itself would seem to dispel any such conclusion. See 323 U. S., at 12–14. Moreover, Mr. Justice Harlan's plurality opinion announcing the judgment of the Court in *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962), lays that question to rest. In *Glidden*, the plurality observed that "it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court." *Id.*, at 566. But they concluded that that circumstance did not render the decisions of

C

When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the

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the Court of Claims legislative in character, nor, impliedly, did those instances of "lively attention" constitute impermissible interferences with the Court of Claims' judicial functions.

"Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. . . . Congress has waived the benefit of *res judicata*, *Cherokee Nation* v. *United States*, 270 U. S. 476, 486, and of defenses based on the passage of time. . . .

"In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. . . . Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States* v. *Realty Co.*, 163 U. S. 427.

"The issue was settled beyond peradventure in *Pope* v. *United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. . . . After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function." *Id.*, at 566–567.

The Court in *Glidden* held that, at least since 1953, the Court of Claims has been an Art. III court. See *id.*, at 585–589 (opinion concurring in result). In his opinion concurring in the result, Mr. Justice Clark did not take issue with the plurality's view that suits against the United States are "Controversies to which the United States shall be a Party," within the meaning of Art. III. Compare 370 U. S., at 562–565 (plurality opinion), with *id.*, at 586–587 (opinion concurring in result).

amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.

Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. That court was left completely free to reaffirm its 1942 judgment that the Black Hills claim was not cognizable under the Fifth Amendment, if upon its review of the facts and law, such a decision was warranted. In this respect, the amendment before us is a far cry from the legislatively enacted "consent judgment" called into question in *Pope*, yet found constitutional as a valid exercise of Congress' broad power to pay the Nation's debts. And, for the same reasons, this amendment clearly is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*.

In sum, as this Court implicitly held in *Cherokee Nation*, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

IV

A

In reaching its conclusion that the 1877 Act effected a taking of the Black Hills for which just compensation was due the Sioux under the Fifth Amendment, the Court of Claims

relied upon the "good faith effort" test developed in its earlier decision in *Three Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968). The *Fort Berthold* test had been designed to reconcile two lines of cases decided by this Court that seemingly were in conflict. The first line, exemplified by *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), recognizes "that Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians." *Id.*, at 565. The second line, exemplified by the more recent decision in *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), concedes Congress' paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Id.*, at 497 (quoting *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935)). In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristically pithy phrase: "Spoliation is not management." 299 U. S., at 498.

The *Fort Berthold* test distinguishes between cases in which one or the other principle is applicable:

> "It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

> "Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 182 Ct. Cl., at 553, 390 F. 2d, at 691.

Applying the *Fort Berthold* test to the facts of this case, the Court of Claims concluded that, in passing the 1877 Act, Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills. The principal issue presented by this case is whether the legal standard applied by the Court of Claims was erroneous.[26]

B

The Government contends that the Court of Claims erred insofar as its holding that the 1877 Act effected a taking of the Black Hills was based on Congress' failure to indicate affirmatively that the consideration given the Sioux was of

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[26] It should be recognized at the outset that the inquiry presented by this case is different from that confronted in the more typical of our recent "taking" decisions. *E. g., Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). In those cases the Court has sought to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U. S., at 124. Here, there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply.

equivalent value to the property rights ceded to the Government. It argues that "the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. The Government derives support for this rule principally from this Court's decision in *Lone Wolf* v. *Hitchcock*.

In *Lone Wolf*, representatives of the Kiowa, Comanche, and Apache Tribes brought an equitable action against the Secretary of the Interior and other governmental officials to enjoin them from enforcing the terms of an Act of Congress that called for the sale of lands held by the Indians pursuant to the Medicine Lodge Treaty of 1867, 15 Stat. 581. That treaty, like the Fort Laramie Treaty of 1868, included a provision that any future cession of reservation lands would be without validity or force "unless executed and signed by at least three fourths of all the adult male Indians occupying the same." *Id.*, at 585. The legislation at issue, Act of June 6, 1900, 31 Stat. 672, was based on an agreement with the Indians that had not been signed by the requisite number of adult males residing on the reservation.

This Court's principal holding in *Lone Wolf* was that "the legislative power might pass laws in conflict with treaties made with the Indians." 187 U. S., at 566. The Court stated:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Con-

> gress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." *Ibid.* (Emphasis in original.) [27]

The Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts." *Id.*, at 568.

In the penultimate paragraph of the opinion, however, the Court in *Lone Wolf* went on to make some observations seemingly directed to the question whether the Act at issue might constitute a taking of Indian property without just compensation. The Court there stated:

> "The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian

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[27] This aspect of the *Lone Wolf* holding, often reaffirmed, see, *e. g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 594 (1977), is not at issue in this case. The Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868. They claim only that Congress could not do so inconsistently with the command of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

> tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. *We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.* In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional." *Ibid.* (Emphasis supplied.)

The Government relies on the italicized sentence in the quotation above to support its view "that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. Several adjoining passages in the paragraph, however, lead us to doubt whether the *Lone Wolf* Court meant to state a general rule applicable to cases such as the one before us.

First, *Lone Wolf* presented a situation in which Congress "purported to give an adequate consideration" for the treaty lands taken from the Indians. In fact, the Act at issue set aside for the Indians a sum certain of $2 million for surplus reservation lands surrendered to the United States. 31 Stat. 678; see 187 U. S., at 555. In contrast, the background of the 1877 Act "reveals a situation where Congress did not 'purport' to provide 'adequate consideration,' nor was there

any meaningful negotiation or arm's-length bargaining, nor did Congress consider it was paying a fair price." 220 Ct. Cl., at 475, 601 F. 2d, at 1176 (concurring opinion).

Second, given the provisions of the Act at issue in *Lone Wolf*, the Court reasonably was able to conclude that "the action of Congress now complained of was but . . . a mere change in the form of investment of Indian tribal property." Under the Act of June 6, 1900, each head of a family was to be allotted a tract of land within the reservation of not less than 320 acres, an additional 480,000 acres of grazing land were set aside for the use of the tribes in common, and $2 million was paid to the Indians for the remaining surplus. 31 Stat. 677–678. In contrast, the historical background to the opening of the Black Hills for settlement, and the terms of the 1877 Act itself, see Part I, *supra*, would not lead one to conclude that the Act effected "a mere change in the form of investment of Indian tribal property."

Third, it seems significant that the views of the Court in *Lone Wolf* were based, in part, on a holding that "Congress possessed full power in the matter." Earlier in the opinion the Court stated: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." 187 U. S., at 565. Thus, it seems that the Court's conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S. 73, 84 (1977).[28]

[28] For this reason, the Government does not here press *Lone Wolf* to its logical limits, arguing instead that its "strict rule" that the management and disposal of tribal lands is a political question, "has been relaxed

Fourth, and following up on the political question holding, the *Lone Wolf* opinion suggests that where the exercise of congressional power results in injury to Indian rights, "relief must be sought by an appeal to that body for redress and not to the courts." Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution. See Parts II and III, *supra*. Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply *Lone Wolf*'s principles of deference. See *United States* v. *Tillamooks*, 329 U. S. 40, 46 (1946) (plurality opinion).

The foregoing considerations support our conclusion that the passage from *Lone Wolf* here relied upon by the Government has limited relevance to this case. More significantly, *Lone Wolf*'s presumption of congressional good faith has little to commend it as an enduring principle for deciding questions

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in recent years to allow review under the Fifth Amendment rational-basis test." Brief for United States 55, n. 46. The Government relies on *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S., at 84–85, and *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974), as establishing a rational-basis test for determining whether Congress, in a given instance, confiscated Indian property or engaged merely in its power to manage and dispose of tribal lands in the Indians' best interests. But those cases, which establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment, do not provide an apt analogy for resolution of the issue presented here—whether Congress' disposition of tribal property was an exercise of its power of eminent domain or its power of guardianship. As noted earlier, n. 27, *supra*, the Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie Treaty. They seek only a holding that the Black Hills "were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe." *United States* v. *Creek Nation*, 295 U. S. 103, 111 (1935). The rational-basis test proffered by the Government would be ill-suited for use in determining whether such circumstances were presented by the events culminating in the passage of the 1877 Act.

of the kind presented here. In every case where a taking of treaty-protected property is alleged,[29] a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *United States* v. *Creek Nation*, 295 U. S., at 109–110. Accord: *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968); *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 122 (1960); *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115–116 (1938); *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497–498 (1937).

As the Court of Claims recognized in its decision below, the question whether a particular measure was appropriate for protecting and advancing the tribe's interests, and therefore not subject to the constitutional command of the Just Compensation Clause, is factual in nature. The answer must be based on a consideration of all the evidence presented. We do not mean to imply that a reviewing court is to second-guess, from the perspective of hindsight, a legislative judgment that a particular measure would serve the best interests of the tribe. We do mean to require courts, in considering whether a particular congressional action was taken in pursuance of Congress' power to manage and control tribal lands

[29] Of course, it has long been held that the taking by the United States of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment. *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 285 (1955). The principles we set forth today are applicable only to instances in which "Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently." *Id.*, at 277. In such instances, "compensation must be paid for subsequent taking." *Id.*, at 277–278.

for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry.

C

We turn to the question whether the Court of Claims' inquiry in this case was guided by an appropriate legal standard. We conclude that it was. In fact, we approve that court's formulation of the inquiry as setting a standard that ought to be emulated by courts faced with resolving future cases presenting the question at issue here:

> "In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired [them], we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition. . . .
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> "The 'good faith effort' and 'transmutation of property' concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That in-

quiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." 220 Ct. Cl., at 451, 601 F. 2d, at 1162.[30]

D

We next examine the factual findings made by the Court of Claims, which led it to the conclusion that the 1877 Act effected a taking. First, the Court found that "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient." 220 Ct. Cl., at 458, 601 F. 2d, at 1166. This finding is fully supported by the record, and the Government does not seriously contend otherwise.[31]

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[30] An examination of this standard reveals that, contrary to the Government's assertion, the Court of Claims in this case did not base its finding of a taking solely on Congress' failure in 1877 to state affirmatively that the "assets" given the Sioux in exchange for the Black Hills were equivalent in value to the land surrendered. Rather, the court left open the possibility that, in an appropriate case, a mere assertion of congressional good faith in setting the terms of a forced surrender of treaty-protected lands could be overcome by objective indicia to the contrary. And, in like fashion, there may be instances in which the consideration provided the Indians for surrendered treaty lands was so patently adequate and fair that Congress' failure to state the obvious would not result in the finding of a compensable taking.

To the extent that the Court of Claims' standard, in this respect, departed from the original formulation of the *Fort Berthold* test, see 220 Ct. Cl., at 486–487, 601 F. 2d, at 1182–1183 (dissenting opinion), such a departure was warranted. The Court of Claims' present formulation of the test, which takes into account the adequacy of the consideration given, does little more than reaffirm the ancient principle that the determination of the measure of just compensation for a taking of private property "is a judicial and not a legislative question." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327 (1893).

[31] The 1877 Act, see *supra*, at 382–383, and n. 14, purported to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization," and "to furnish to them schools and instruction in mechani-

Second, the court found, after engaging in an exhaustive review of the historical record, that neither the Manypenny Commission, nor the congressional Committees that approved the 1877 Act, nor the individual legislators who spoke on its behalf on the floor of Congress, ever indicated a belief that the Government's obligation to provide the Sioux with rations constituted a fair equivalent for the value of the Black Hills and the additional property rights the Indians were forced to

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cal and agricultural arts, as provided for by the treaty of 1868." 19 Stat. 256. The Court of Claims correctly concluded that the first item "was so vague that it cannot be considered as constituting a meaningful or significant element of payment by the United States." 220 Ct. Cl., at 458, 601 F. 2d, at 1166. As for the second, it "gave the Sioux nothing to which they were not already entitled [under the 1868 treaty]." *Ibid.*

The Government has placed some reliance in this Court on the fact that the 1877 Act extended the northern boundaries of the reservation by adding some 900,000 acres of grazing lands. See n. 14, *supra*. In the Court of Claims, however, the Government did "not contend . . . that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." 220 Ct. Cl., at 453, n. 3, 601 F. 2d, at 1163, n. 3. And Congress obviously did not intend the extension of the reservation's northern border to constitute consideration for the property rights surrendered by the Sioux. The extension was effected in that article of the Act redefining the reservation's borders; it was not mentioned in the article which stated the consideration given for the Sioux' "cession of territory and rights." See 19 Stat. 255–256. Moreover, our characterizing the 900,000 acres as assets given the Sioux in consideration for the property rights they ceded would not lead us to conclude that the terms of the exchange were "so patently adequate and fair" that a compensable taking should not have been found. See n. 30, *supra*.

Finally, we note that the Government does not claim that the Indian Claims Commission and the Court of Claims incorrectly valued the property rights taken by the 1877 Act by failing to consider the extension of the northern border. Rather, the Government argues only that the 900,000 acres should be considered, along with the obligation to provide rations, in determining whether the Act, viewed in its entirety, constituted a good-faith effort on the part of Congress to promote the Sioux' welfare. See Brief for United States 73, and n. 58.

surrender. See *id.*, at 458–462, 601 F. 2d, at 1166–1168. This finding is unchallenged by the Government.

A third finding lending some weight to the Court's legal conclusion was that the conditions placed by the Government on the Sioux' entitlement to rations, see n. 14, *supra*, "further show that the government's undertaking to furnish rations to the Indians until they could support themselves did not reflect a congressional decision that the value of the rations was the equivalent of the land the Indians were giving up, but instead was an attempt to coerce the Sioux into capitulating to congressional demands." 220 Ct. Cl., at 461, 601 F. 2d, at 1168. We might add only that this finding is fully consistent with similar observations made by this Court nearly a century ago in an analogous case.

In *Choctaw Nation* v. *United States*, 119 U. S. 1, 35 (1886), the Court held, over objections by the Government, that an earlier award made by the Senate on an Indian tribe's treaty claim "was fair, just, and equitable." The treaty at issue had called for the removal of the Choctaw Nation from treaty-protected lands in exchange for payments for the tribe's subsistence for one year, payments for cattle and improvements on the new reservation, an annuity of $20,000 for 20 years commencing upon removal, and the provision of educational and agricultural services. *Id.*, at 38. Some years thereafter the Senate had awarded the Indians a substantial recovery based on the latter treaty's failure to compensate the Choctaw for the lands they had ceded. Congress later enacted a jurisdictional statute which permitted the United States to contest the fairness of the Senate's award as a settlement of the Indian's treaty claim. In rejecting the Government's arguments, and accepting the Senate's award as "furnish[ing] the nearest approximation to the justice and right of the case," *id.*, at 35, this Court observed:

> "It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure

had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres." *Id.*, at 37–38.

As for the payments that had been made to the Indians in order to induce them to remove themselves from their treaty lands, the Court, in words we find applicable to the 1877 Act, concluded:

"It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. *As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.*" *Id.*, at 38 (emphasis supplied).

These conclusions, in light of the historical background to the opening of the Black Hills for settlement, see Part I, *supra*, seem fully applicable to Congress' decision to remove the Sioux from that valuable tract of land, and to extinguish their off-reservation hunting rights.

Finally, the Court of Claims rejected the Government's contention that the fact that it subsequently had spent at least $43 million on rations for the Sioux (over the course of three-quarters of a century) established that the 1877 Act was an act of guardianship taken in the Sioux' best interest. The court concluded: "The critical inquiry is what Congress

did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation." 220 Ct. Cl., at 462, 601 F. 2d, at 1168. It found no basis for believing that Congress, in 1877, anticipated that it would take the Sioux such a lengthy period of time to become self-sufficient, or that the fulfillment of the Government's obligation to feed the Sioux would entail the large expenditures ultimately made on their behalf. *Ibid.* We find no basis on which to question the legal standard applied by the Court of Claims, or the findings it reached, concerning Congress' decision to provide the Sioux with rations.

E

The aforementioned findings fully support the Court of Claims' conclusion that the 1877 Act appropriated the Black Hills "in circumstances which involved an implied undertaking by [the United States] to make just compensation to the tribe." [32] *United States* v. *Creek Nation*, 295 U. S., at 111.

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[32] The dissenting opinion suggests, *post*, at 434–437, that the factual findings of the Indian Claims Commission, the Court of Claims, and now this Court, are based upon a "revisionist" view of history. The dissent fails to identify which materials quoted herein or relied upon by the Commission and the Court of Claims fit that description. The dissent's allusion to historians "writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees," *post*, at 435, is also puzzling because, with respect to this case, we are unaware that any such historian exists.

The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record. No one, including the Government, has ever suggested that the factual findings of the Indian Claims Commission and the Court of Claims fail to meet that standard of review.

A further word seems to be in order. The dissenting opinion does not identify a single author, nonrevisionist, neorevisionist, or otherwise, who

We make only two additional observations about this case. First, dating at least from the decision in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657 (1890), this Court has recognized that Indian lands, to which a tribe holds recognized title, "are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." In the same decision the Court emphasized that the owner of such lands "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.*, at 659. The Court of Claims gave effect to this principle when it held that the Government's uncertain and indefinite obligation to provide the Sioux with rations until they became self-sufficient did not constitute adequate consideration for the Black Hills.

Second, it seems readily apparent to us that the obligation to provide rations to the Sioux was undertaken in order to ensure them a means of surviving their transition from the nomadic life of the hunt to the agrarian lifestyle Congress had chosen for them. Those who have studied the Government's reservation policy during this period of our Nation's history agree. See n. 11, *supra*. It is important to recognize

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takes the view of the history of the cession of the Black Hills that the dissent prefers to adopt, largely, one assumes, as an article of faith. Rather, the dissent relies on the historical findings contained in the decision rendered by the Court of Claims in 1942. That decision, and those findings, are not before this Court today. Moreover, the holding of the Court of Claims in 1942, to the extent the decision can be read as reaching the merits of the Sioux' taking claim, was based largely on the conclusive presumption of good faith toward the Indians which that court afforded to Congress' actions of 1877. See 97 Ct. Cl., at 669–673, 685. The divergence of results between that decision and the judgment of the Court of Claims affirmed today, which the dissent would attribute to historical revisionism, see *post*, at 434–435, is more logically explained by the fact that the former decision was based on an erroneous *legal* interpretation of this Court's opinion in *Lone Wolf*. See Part IV–B, *supra*.

that the 1877 Act, in addition to removing the Black Hills from the Great Sioux Reservation, also ceded the Sioux' hunting rights in a vast tract of land extending beyond the boundaries of that reservation. See n. 14, *supra.* Under such circumstances, it is reasonable to conclude that Congress' undertaking of an obligation to provide rations for the Sioux was a *quid pro quo* for depriving them of their chosen way of life, and was not intended to compensate them for the taking of the Black Hills.[33]

V

In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lone*

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[33] We find further support for this conclusion in Congress' 1974 amendment to § 2 of the Indian Claims Commission Act, 25 U. S. C. § 70a. See n. 17, *supra.* That amendment provided that in determining offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." The Report of the Senate Committee on Interior and Insular Affairs, which accompanied this amendment, made two points that are pertinent here. First, it noted that "[a]lthough couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case." S. Rep. No. 93–863, p. 2 (1974) (incorporating memorandum prepared by the Sioux Tribes). Second, the Committee observed:

"The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs." *Id.*, at 4–5.

See also R. Billington, Introduction, in National Park Service, Soldier and Brave xiv (1963) ("The Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded").

Wolf v. *Hitchcock*, 187 U. S., at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

The judgment of the Court of Claims is affirmed.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I agree that there is no constitutional infirmity in the direction by Congress that the Court of Claims consider this case without regard to the defense of res judicata. I also agree that the Court of Claims correctly decided this case. Accordingly, I concur in Parts III and V of the Court's opinion and in the judgment.

MR. JUSTICE REHNQUIST, dissenting.

In 1942, the Sioux Tribe filed a petition for certiorari requesting this Court to review the Court of Claims' ruling that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands—an exchange Congress believed to be in the best interests of the Sioux and the Nation. This Court declined to review that judgment. *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943). Yet today the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943, and proceeds to reject the 1942 Court of Claims' factual interpretation of the events in 1877. I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding, that there is no judicial principle justifying the decision to afford the respondents an additional

opportunity to litigate the same claim, and that the Court of Claims' first interpretation of the events in 1877 was by all accounts the more realistic one. I therefore dissent.

I

In 1920, Congress enacted a special jurisdictional Act, ch. 222, 41 Stat. 738, authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims. The Sioux filed suit claiming that the 1877 Act removing the Black Hills from the Sioux territory was an unconstitutional taking. In *Sioux Tribe* v. *United States, supra,* the Court of Claims considered the question fully and found that the United States had not taken the Black Hills from the Sioux within the meaning of the Fifth Amendment. It is important to highlight what that court found. It did not decide, as the Court today suggests, that it merely lacked jurisdiction over the claim presented by the Sioux. See *ante,* at 384. It found that under the circumstances presented in 1877, Congress attempted to improve the situation of the Sioux and the Nation by exchanging the Black Hills for 900,000 acres of grazing lands and rations for as long as they should be needed. The court found that although the Government attempted to keep white settlers and gold prospectors out of the Black Hills territory, these efforts were unsuccessful. The court concluded that this situation was such that the Government "believed serious conflicts would develop between the settlers and the Government, and between the settlers and the Indians." 97 Ct. Cl., at 659. It was also apparent to Congress that the Indians were still "incapable of supporting themselves." *Ibid.*

The court found that the Government therefore embarked upon a course designed to obtain the Indians' agreement to sell the Black Hills and "endeavored in every way possible during 1875 and 1876 to arrive at a mutual agreement with the Indians for the sale. . . ." *Id.,* at 681. Negotiation having failed, Congress then turned to design terms for the ac-

quisition of the Black Hills which it found to be in the best interest of both the United States and the Sioux. The court found that pursuant to the 1877 agreement, Congress provided the Indians with more than $43 million in rations as well as providing them with 900,000 acres of needed grazing lands. Thus the court concluded that "the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties." *Id.*, at 668. The court emphasized:

> "[T]he Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the . . . Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay." *Id.*, at 667.

This Court denied certiorari. 318 U. S. 789 (1943).

During the course of further litigation commencing in 1950, the Sioux again resubmitted their claim that the Black Hills were taken unconstitutionally. The Government pleaded res judicata as a defense. The Court of Claims held that res judicata barred relitigation of the question since the original Court of Claims decision had clearly held that the appropriation of the Black Hills was not a taking because Congress in "exercising its plenary power over Indian tribes, took their land without their consent and substituted for it something conceived by Congress to be an equivalent." *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 243, 518 F. 2d 1298, 1303 (1975). The court found no basis for relieving the Sioux from the bar of res judicata finding that the disability "is not lifted if a later court disagrees with a prior one." *Id.*, at 244,

518 F. 2d, at 1303. The court thus considered the equities entailed by the application of res judicata in this case and held that relitigation was unwarranted. Again, this Court denied certiorari. 423 U. S. 1016 (1975).

Congress then passed another statute authorizing the Sioux to relitigate their taking claim in the Court of Claims. 92 Stat. 153. The statute provided that the Court of Claims "*shall* review on the merits" the Sioux claim that there was a taking and that the Court "*shall determine that issue de novo.*" (Emphasis added.) Neither party submitted additional evidence and the Court of Claims decided the case on the basis of the record generated in the 1942 case and before the Commission. On the basis of that same record, the Court of Claims has now determined that the facts establish that Congress did not act in the best interest of the Sioux, as the 1942 court found, but arbitrarily appropriated the Black Hills without affording just compensation. This Court now embraces this second, latter-day interpretation of the facts in 1877.

II

Although the Court refrains from so boldly characterizing its action, it is obvious from these facts that Congress has reviewed the decisions of the Court of Claims, set aside the judgment that no taking of the Black Hills occurred, set aside the judgment that there is no cognizable reason for relitigating this claim, and ordered a new trial. I am convinced that this is nothing other than an exercise of judicial power reserved to Art. III courts that may not be performed by the Legislative Branch under its Art. I authority.

Article III vests "the judical Power . . . of the United States" in federal courts. Congress is vested by Art. I with *legislative* powers, and may not itself exercise an appellate-type review of judicial judgments in order to alter their terms, or to order new trials of cases already decided. The judges in *Hayburn's Case*, 2 Dall. 409, 413, n. 4 (1792), stated

that "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested." We have interpreted the decision in *United States* v. *Klein*, 13 Wall. 128 (1872), as having "rested upon the ground that . . . Congress was without constitutional authority to control the exercise of . . . judicial power . . . by requiring this Court to set aside the judgment of the Court of Claims" and as holding that Congress may not "require a new trial of the issues . . . which the Court had resolved against [a party]." *Pope* v. *United States*, 323 U. S. 1, 8, 9 (1944).

This principle was again applied in *United States* v. *O'Grady*, 22 Wall. 641, 647 (1875), where the Court refused to legitimize a congressional attempt to revise a final judgment rendered by the Court of Claims finding that such judgments "are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, *absolutely conclusive of the rights of the parties, unless a new trial is granted by that court. . . .*" (Emphasis added.) The Court further found that there is only one Supreme Court and "[i]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *Id.*, at 648. See also *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948). Congress has exceeded the legislative boundaries drawn by these cases and the Constitution and exercised judicial power in a case already decided by effectively ordering a new trial.

The determination of whether this action is an exercise of legislative or judicial power is of course one of characterization. The fact that the judicial process is affected by an Act of Con-

gress is not dispositive since many actions which this Court has clearly held to be legitimate exercises of legislative authority do have an effect on the judiciary and its processes. Congress may legitimately exercise legislative powers in the regulation of judicial jurisdiction; and it may, like other litigants, change the import of a final judgment by establishing new legal rights after the date of judgment, and have an effect on the grounds available for a court's decision by waiving available defenses. But as the Court apparently concedes, Congress may not, in the name of those legitimate actions, review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case.

The Court relies heavily on the fact that Congress was acting pursuant to its power to pay the Nation's debts. No doubt, Congress has broad power to do just that, but it may do so only through the exercise of legislative, not judicial powers. Thus the question must be, not whether Congress was attempting to pay its debts through this Act, but whether it attempted to do so by means of judicial power. The Court suggests that the congressional action in issue is justified as either a permissible regulation of jurisdiction, the creation of a new obligation, or the mere waiver of a litigant's right. These alternative nonjudicial characterizations of the congressional action, however, are simply unpersuasive.

A

The Court first attempts to categorize this action as a permissible regulation of jurisdiction stating that all Congress has done is to "provid[e] a forum so that a new judicial review of the Black Hills claim could take place." But that is the essence of an appellate or trial court decision ordering a new trial. While Congress may *regulate* judicial functions it may not itself *exercise* them. Admittedly, it is not always readily apparent whether a particular action constitutes the assignment or the exercise of a judicial function since

the assignment of some functions is inherently judicial—such as assigning the trial court the task of rehearing a case because of error. The guidelines identified in our opinions, however, indicate that while Congress enjoys broad authority to regulate judicial proceedings in the context of a *class* of cases, *Johannessen* v. *United States*, 225 U. S. 227 (1912), when Congress regulates functions of the judiciary in a *pending* case it walks the line between judicial and legislative authority, and exceeds that line if it sets aside a judgment or orders retrial of a previously adjudicated issue. *United States* v. *Klein*, *supra*, at 145; *Pope* v. *United States*, *supra*.

By ordering a *re*hearing in a pending case, Congress does not merely assign a judicial function, it necessarily reviews and sets aside an otherwise final adjudication; actions which this Court concedes Congress cannot permissibly take under the decisions of this Court. *Ante*, at 391–392. The Court concludes that no "review" of the Court of Claims decisions (and our denials of certiorari) has occurred, and that the finality of the judgments has not been disturbed, principally because Congress has not dictated a rule of decision that must govern the ultimate outcome of the adjudication. The fact that Congress did not dictate to the Court of Claims that a particular result be reached does not in any way negate the fact it has sought to exercise judicial power. This Court and other appellate courts often reverse a trial court for error without indicating what the result should be when the claim is heard again.

It is also apparent that Congress must have "reviewed" the merits of the litigation and concluded that for some reason, the Sioux should have a second opportunity to air their claims. The order of a new trial inevitably reflects some measure of dissatisfaction with at least the manner in which the original claim was heard. It certainly seems doubtful that Congress would grant a litigant a new trial if convinced that the litigant had been fairly heard in the first instance. Unless Congress is assuming that there were deficiencies in the prior judicial

proceeding, why would it see fit to appropriate public money to have the claim heard once again? It would seem that Congress did not find the opinions of the Court of Claims fully persuasive. But it is not the province of Congress to judge the persuasiveness of the opinions of federal courts—that is the judiciary's province alone. It is equally apparent that Congress has set aside the judgments of the Court of Claims. Previously those judgments were dispositive of the issues litigated in them; Congress now says that they are not. The action of Congress cannot be justified as the regulation of the jurisdiction of the federal courts because it seeks to provide a forum for the purposes of reviewing a previously final judgment in a pending case.

B

The action also cannot be characterized and upheld as merely an exercise of a litigant's power to change the effect of a judgment by agreeing to obligations beyond those required by a particular judgment. This Court has clearly never found that the judicial power is encroached upon because Congress seeks to change the law after a question has been adjudicated. See, *e. g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856); *Hodges* v. *Snyder*, 261 U. S. 600 (1923). This is a recognition of the right of every litigant to pay his adversary more than the court says is required if he so chooses. Congress, acting under its spending powers, is, like an individual, entitled to enlarge its obligations after the court has adjudicated a question. The decision in *Pope* v. *United States*, 323 U. S. 1 (1944), clearly rests upon this distinction.

But here Congress has made no change in the applicable law. It has not provided, as our opinions make clear it could have, that the Sioux should recover for all interest on the value of the Black Hills. Counsel for respondents in fact stated at oral argument that he could not persuade Congress "to go that far." Congress has not changed the rule of law, it simply directed the judiciary to try again. Congress may not attempt

to shift its legislative responsibilities and satisfy its constituents by discarding final judgments and ordering new trials.

C

The Court also suggests that the congressional action is but a "mere waiver" of a defense within a litigant's prerogative. *Ante,* at 407. Congress certainly is no different from other litigants in this regard, and if the congressional action in this case could convincingly be construed as having an effect no greater than an ordinary litigant's waiver, I certainly would not object that Congress was exercising judicial power. But it is apparent that the congressional action in issue accomplished far more than a litigant's waiver. Congress clearly required the Court of Claims to hear the case in full, and only if a waiver of res judicata by a litigant would always impose an obligation on a federal court to rehear such a claim, could it be said that Congress has exercised the power of a litigant rather than the power of a legislature.

While res judicata is a defense which can be waived, see Fed. Rule Civ. Proc. 8 (c), if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte,* even though the defense has not been raised. See *Hedger Transportation Corp.* v. *Ira S. Bushey & Sons,* 186 F. 2d 236 (CA2 1951); *Evarts* v. *Western Metal Finishing Co.,* 253 F. 2d 637, 639, n. 1 (CA9), cert. denied, 358 U. S. 815 (1958); *Scholla* v. *Scholla,* 92 U. S. App. D. C. 9, 201 F. 2d 211 (1953); *Hicks* v. *Holland,* 235 F. 2d 183 (CA6), cert. denied, 352 U. S. 855 (1956). This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste. *Commissioner* v. *Sunnen,* 333 U. S. 591, 597 (1948); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 328 (1971); *Parklane Hosiery Co.* v. *Shore,* 439 U. S. 322 (1979). The Court of Claims itself has indicated that it would not engage

in reconsideration of an issue previously decided by the Court of Claims without substantial justification:

> "It is well to remember that *res judicata* and its offspring, collateral estoppel, are not statutory defenses; they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen* v. *United States,* 157 Ct. Cl. 798, 800 (1962).

It matters not that the defendant has consented to the relitigation of the claim since the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding. Since the Court of Claims found in this case that there was no adequate reason for denying res judicata effect after the issue was raised and the respondents were given an opportunity to demonstrate why res judicata should not apply, it is clear that the issue has been heard again only because Congress used its legislative authority to mandate a rehearing. The Court of Claims apparently acknowledged that this in fact was the effect of the legislation, for it did not state that readjudication was the product of a waiver, but rather that through its decision the court "carried out the *obligation imposed upon us* in the 1978 jurisdictional statute." (Emphasis added.)

Nor do I find this Court's decision in *Cherokee Nation* v. *United States,* 270 U. S. 476 (1926), dispositive. Again, in *Cherokee Nation,* the Court was asked to consider and decide a question not previously adjudicated by the Court of Claims. The Court stated that the theory of interest presented in the second adjudication was not "presented either to the Court

of Claims or to this Court. It is a new argument not before considered." *Id.*, at 486. Thus even *Cherokee Nation* did not involve congressionally mandated judicial re-examination of a question previously decided by an Art. III court.

Here, in contrast, the issue decided is identical to that decided in 1942. It is quite clear from a comparison of the 1942 decision of the Court of Claims and the opinion of the Court today that the only thing that has changed is an interpretation of the events which occurred in 1877. The Court today concludes that the facts in this case "would not lead one to conclude that the Act effected 'a mere change in the form of investment of Indian tribal property.'" *Ante*, at 413. But that is precisely what the Court of Claims found in 1942. See *supra*, at 425–426. There has not even been a change in the law, for the Court today relies on decisions rendered long before the Court of Claims decision in 1942. It is the view of history, and not the law, which has evolved. See *infra*, at 434–437. The decision is thus clearly nothing more than a second interpretation of the precise factual question decided in 1942. As the dissenting judges in the Court of Claims aptly stated: "The facts have not changed. We have been offered no new evidence." 220 Ct. Cl. 442, 489, 601 F. 2d 1157, 1184.

It is therefore apparent that Congress has accomplished more than a private litigant's attempted waiver, more than legislative control over the general jurisdiction of the federal courts, and more than the establishment of a new rule of law for a previously decided case. What Congress has done is uniquely judicial. It has reviewed a prior decision of an Art. III court, eviscerated the finality of that judgment, and ordered a new trial in a pending case.

III

Even if I could countenance the Court's decision to reach the merits of this case, I also think it has erred in rejecting the 1942 court's interpretation of the facts. That court

rendered a very persuasive account of the congressional enactment. See *supra,* at 425–426. As the dissenting judges in the Court of Claims opinion under review pointedly stated: "The majority's view that the rations were not consideration for the Black Hills in untenable. What else was the money for?" 220 Ct. Cl., at 487, 601 F. 2d, at 1183.

I think the Court today rejects that conclusion largely on the basis of a view of the settlement of the American West which is not universally shared. There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of "revisionist" historians or the mores of another era actions that were taken under pressure of time more than a century ago.

Different historians, not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court's opinion. This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science.

But the inferences which the Court itself draws from the letter from General Sheridan to General Sherman reporting on a meeting between the former with President Grant, the Secretary of the Interior, and the Secretary of War, as well as other passages in the Court's opinion, leave a stereotyped and one-sided impression both of the settlement regarding the Black Hills portion of the Great Sioux Reservation and of the gradual expansion of the National Government from the Proclamation Line of King George III in 1763 to the Pacific Ocean.

Ray Billington, a senior research associate at the Huntington Library in San Marino, Cal., since 1963, and a respected student of the settlement of the American West, em-

phasized in his introduction to the book Soldier and Brave (National Park Service, U. S. Dept. of the Interior, 1963) that the confrontations in the West were the product of a long history, not a conniving Presidential administration:

> "Three centuries of bitter Indian warfare reached a tragic climax on the plains and mountains of America's Far West. Since the early seventeenth century, when Chief Opechancanough rallied his Powhatan tribesmen against the Virginia intruders on their lands, each advance of the frontier had been met with stubborn resistance. At times this conflict flamed into open warfare: in King Phillips' rebellion against the Massachusetts Puritans, during the French and Indian Wars of the eighteenth century, in Chief Pontiac's assault on his new British overlords in 1763, in Chief Tecumseh's vain efforts to hold back the advancing pioneers of 1812, and in the Black Hawk War. . . .
>
> ". . . In three tragic decades, between 1860 and 1890, the Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded.
>
> "This epic struggle left its landmarks behind, as monuments to the brave men, Indian and white, who fought and died that their manner of living might endure." *Id.*, at xiii–xiv.

Another history highlights the cultural differences which made conflict and brutal warfare inevitable:

> "The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens; and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe, and a highly developed sign language

was the only means of intertribal communication. The effective unit was the band or village of a few hundred souls, which might be seen in the course of its wanderings encamped by a watercourse with tipis erected; or pouring over the plain, women and children leading dogs and packhorses with their trailing travois, while gaily dressed braves loped ahead on horseback. They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching." S. Morison, The Oxford History of the American People 539–540 (1965).

That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: "Judge not, that ye be not judged."

REID *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 79–448. Decided June 30, 1980

Upon his early morning arrival at the Atlanta Airport on a commercial flight, petitioner was seen by a federal narcotics agent to look occasionally backward at a second man. Petitioner and the other man each carried a shoulder bag and apparently had no other luggage. When the two men left the terminal together, the agent asked them for identification, and after they had consented to a search of their persons and shoulder bags, petitioner tried to run away, and before being apprehended, abandoned his bag, which was subsequently found to contain cocaine. Prior to his trial on a charge of possessing cocaine, petitioner's motion to suppress the cocaine was granted by the Georgia trial court, but the Georgia Court of Appeals reversed, holding that the stop of petitioner was permissible, since he appeared to the agent to fit the so-called "drug courier profile."

Held: The agent could not, as a matter of law, have reasonably suspected petitioner of criminal activity on the basis of the observed circumstances. Only the fact that petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct, whereas the other circumstances describe a very large category of presumably innocent travelers. The fact that the agent believed that petitioner and his companion were attempting to conceal the fact that they were traveling together is too slender a reed to support the seizure.

Certiorari granted; 149 Ga. App. 685, 255 S. E. 2d 71, vacated and remanded.

PER CURIAM.

The petitioner was indicted in the Superior Court of Fulton County, Ga., for possessing cocaine. At a hearing before trial, he moved to suppress the introduction of the cocaine as evidence against him on the ground that it had been seized from him by an agent of the federal Drug Enforcement Administration (DEA) in violation of his rights under the Fourth and Fourteenth Amendments.

The relevant facts were determined at the pretrial hearing and may be recounted briefly. The petitioner arrived at the Atlanta Airport on a commercial airline flight from Fort Lauderdale, Fla., in the early morning hours of August 14, 1978. The passengers left the plane in a single file and proceeded through the concourse. The petitioner was observed by an agent of the DEA, who was in the airport for the purpose of uncovering illicit commerce in narcotics. Separated from the petitioner by several persons was another man, who carried a shoulder bag like the one the petitioner carried. As they proceeded through the concourse past the baggage claim area, the petitioner occasionally looked backward in the direction of the second man. When they reached the main lobby of the terminal, the second man caught up with the petitioner and spoke briefly with him. They then left the terminal building together.

The DEA agent approached them outside of the building, identified himself as a federal narcotics agent, and asked them to show him their airline ticket stubs and identification, which they did. The airline tickets had been purchased with the petitioner's credit card and indicated that the men had stayed in Fort Lauderdale only one day. According to the agent's testimony, the men appeared nervous during the encounter. The agent then asked them if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags. The agent testified that the petitioner nodded his head affirmatively, and that the other responded, "Yeah, okay." As the three of them entered the terminal, however, the petitioner began to run and before he was apprehended, abandoned his shoulder bag. The bag, when recovered, was found to contain cocaine.

The Superior Court granted the petitioner's motion to suppress the cocaine, concluding that it had been obtained as a result of a seizure of him by the DEA agent without an articulable suspicion that he was unlawfully carrying narcotics. The Georgia Court of Appeals reversed. 149 Ga. App. 685,

255 S. E. 2d 71. It held that the stop of the petitioner was permissible, citing *Terry* v. *Ohio*, 392 U. S. 1 (1968), since the petitioner, "in a number of respects, fit a 'profile' of drug couriers compiled by the [DEA]." 149 Ga. App., at 686, 255 S. E. 2d, at 72. The appellate court also concluded that the petitioner had consented to return to the terminal for a search of his person, and that after he had attempted to flee and had discarded his shoulder bag, there existed probable cause for the search of the bag.

The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968)." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).* While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. See *Brown* v. *Texas*, 443 U. S. 47, 51 (1979); *Delaware* v. *Prouse*, 440 U. S. 648, 661 (1979); *United States* v. *Brignoni-Ponce*, *supra*; *Adams* v. *Williams*, 407 U. S. 143, 146–149 (1972); *Terry* v. *Ohio*, *supra*.

The appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profile," a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the court thought

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*"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968). See also *id.*, at 34 (WHITE, J., concurring); *id.*, at 31, 32–33 (Harlan, J., concurring).

it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry* v. *Ohio*, *supra*, at 27–28, this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch,'" 392 U. S., at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

For these reasons, the judgment of the appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the petitioner when he approached him outside the airline terminal. Accordingly, the petition for certiorari is granted, the judgment of the Georgia

Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST dissents for the reasons stated by MR. JUSTICE STEWART in his opinion in *United States* v. *Mendenhall*, 446 U. S. 544 (1980). He believes that the police conduct involved did not implicate the Fourteenth or Fourth Amendment rights of the petitioners.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring.[1]

This case is similar in many respects to *United States* v. *Mendenhall*, 446 U. S. 544 (1980), in which a defendant observed walking through an airport was stopped by DEA agents and asked for identification. The threshold question in *Mendenhall*, as here, was whether the agent's initial stop of the suspect constituted a seizure within the meaning of the Fourth Amendment. MR. JUSTICE STEWART, joined by MR. JUSTICE REHNQUIST, was of the opinion that the mere stopping of a person for identification purposes is not a seizure:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554.[2]

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[1] I agree, on the basis of the fragmentary facts apparently relied upon by the DEA agents in this case, that there was no justification for a "seizure."

[2] MR. JUSTICE STEWART also noted that "'[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.'" 446 U. S., at 553, quoting *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). See also *ante*, at 440, n.

Thus, on the basis of facts remarkably similar to those in the present case, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST decided that no seizure had occurred.

My concurring opinion in *Mendenhall*, in which THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN joined, did not consider the seizure issue because it had not been raised in the courts below. Even if the stop constituted a seizure, it was my view that the DEA agents had articulable and reasonable grounds for believing that the individual was engaged in criminal activity. Therefore, they did not violate the Fourth Amendment by stopping that person for routine questioning. I expressly stated, however, that my decision not to reach the seizure issue did not necessarily indicate disagreement with the views of MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST. *Id.*, at 560, n. 1.[3]

The state courts, which decided this case before our decision in *Mendenhall*, did not consider whether the petitioner had been seized. Rather, those courts apparently assumed that the stop for routine identification questioning constituted a seizure, and addressed only the question whether the agent's actions were justified by articulable and reasonable grounds of suspicion. Because we similarly do not consider the initial seizure question in our decision today, that issue remains open for consideration by the state courts in light of the opinions in *Mendenhall*.

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[3] MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS, filed a dissenting opinion in *Mendenhall* in which they concluded that the respondent had been detained in violation of the Fourth Amendment.

MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION *v.* KLIMAS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-622. Decided June 30, 1980

Respondent was convicted of burglary and grand larceny in an Arkansas state court and sentenced by the jury to the maximum sentence permissible under the state recidivist statute. On appeal, the Arkansas Supreme Court reversed, holding that evidence of certain prior felony convictions was inadmissible for the purpose of enhancing respondent's sentence, and revised the sentence to the permissible minimum. Respondent then brought a habeas corpus petition in Federal District Court, alleging that his sentencing after trial had been unconstitutional and was not remedied by the Arkansas Supreme Court's revision of it. The District Court dismissed the suit for want of jurisdiction, but the Court of Appeals reversed, holding that respondent had been denied due process of law by the failure to permit him to be resentenced by a jury, and that resentencing was required because the recidivist statute had been amended since respondent's trial and, if the amendment applied to him, would now provide a lower minimum sentence.

Held: Where the claim that respondent is entitled to be resentenced by reason of the amended recidivist statute apparently has not been presented to the state courts, a federal court, in the absence of any reason to believe that state judicial remedies would now be unavailable, is required to stay its hand to give the State the initial opportunity to pass upon and correct alleged violations of federal rights. The requirement of 28 U. S. C. §§ 2254 (b) and (c) that state remedies first be pursued is particularly appropriate where, as here, the federal constitutional claim arises from the alleged deprivation by state courts of rights created under state law.

Certiorari granted; 599 F. 2d 842, reversed and remanded.

PER CURIAM.

The respondent was convicted by a jury in an Arkansas court of burglary and grand larceny. In accordance with the recidivist statute then in effect in Arkansas, the members of the jury were instructed that if they found that the re-

spondent had been convicted of three prior felony offenses, they could fix his sentence at not less than 21 and not more than 31½ years for both burglary and grand larceny. Evidence was admitted of seven prior felony convictions from Missouri and of six from Arkansas. The jury found that the petitioner had been convicted of three prior felonies, and set his punishment at 31½ years for each of the two offenses of which they had found him guilty. The trial judge ordered that the terms were to be served consecutively.

On appeal, the Arkansas Supreme Court reversed, concluding that the evidence of the Missouri convictions was inadmissible for the purpose of enhancing the respondent's sentence because it did not appear that he had had the assistance of counsel at the trial of those cases. *Klimas* v. *State,* 259 Ark. 301, 303–304, 534 S. W. 2d 202, 204, citing *Burgett* v. *Texas,* 389 U. S. 109 (1967). The court directed that the respondent be retried unless the State agreed to a reduction of his sentence to three years, the minimum sentence that he could have received for the burglary and larceny offenses. 259 Ark., at 309, 534 S. W. 2d, at 207. On rehearing, the court revised the sentence to 42 years, comprised of the two minimum terms of 21 years authorized for the offenses in the case of a defendant having three past convictions. The court reasoned that since the jury had been required to consider the six Arkansas convictions whose validity the respondent had not disputed at trial, it could not have fixed the punishment at less than 21 years for each offense.[1]

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[1] The respondent contends that the minimum sentence he could have received was 21, not 42 years, since the trial judge was allegedly authorized to direct that the burglary and larceny sentences run concurrently. This was also the view of Judge Henley, dissenting from the Court of Appeals' denial of en banc consideration of the case. 603 F. 2d 158, 159 (CA8 1979). Because the question was not decided either by the Arkansas Supreme Court or by the federal courts in this case, we do not now consider it.

The respondent then sought a writ of habeas corpus in a Federal District Court, alleging that his sentencing after trial had been unconstitutional and was not remedied by the Arkansas Supreme Court's revision of it to 42 years. The District Court dismissed the suit for want of jurisdiction, but the Court of Appeals reversed, concluding that the respondent had been denied due process of law by the State's failure to permit him to be resentenced by a jury, in accord with what it understood to be state statutory law. 599 F. 2d 842 (CA8 1979). The Court of Appeals acknowledged that the omission of discretionary resentencing by a jury would not have prejudiced the respondent if, as the Arkansas Supreme Court had concluded, he had received the most lenient sentence authorized by law for the offenses of which he had been convicted. Cf. *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980).[2] But the Court of Appeals believed that resentencing was required in this case because the habitual offender statute had been amended since the respondent's trial, and, if applied to him, the amended statute would provide a lower minimum

[2] In *Hicks* v. *Oklahoma*, this Court held that the right of a criminal defendant under state law to have his punishment fixed in the discretion of the trial jury gave him "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489, citing *Wolff* v. *McDonnell*, 418 U. S. 539; *Greenholtz* v. *Nebraska Penal Inmates*, *supra*; *Morrissey* v. *Brewer*, 408 U. S. 471." 447 U. S., at 346. The jury in *Hicks* had fixed the petitioner's punishment at 40 years, in accord with the mandatory terms of the State's habitual offender statute then in effect. On appeal, the mandatory provision was determined to be invalid, but the appellate court nonetheless affirmed the 40-year sentence because it was within the range of punishments that a correctly instructed jury could have imposed in any event. This Court concluded that the deprivation of a discretionary jury sentence that could well have been less than 40 years had denied the petitioner due process of law. *Ibid.*

sentence.[2] Accordingly, while the court expressed uncertainty whether the amendment applied to the respondent, it nonetheless ordered that the District Court issue the writ unless he was resentenced by a jury.

The claim that the respondent is entitled to be resentenced by reason of the amended recidivist statute apparently has not been presented to the state courts. In these circumstances, in the absence of any reason to believe that state judicial remedies would now be unavailable, a federal court is required to stay its hand "to give the State the initial 'opportunity to pass upon and correct' alleged violations of . . . federal rights." *Wilwording* v. *Swenson*, 404 U. S. 249, 250 (1971), quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). See *Picard* v. *Connor*, 404 U. S. 270, 277–278 (1971). The requirement that state remedies first be pursued, codified in the federal habeas corpus statute, 28 U. S. C. §§ 2254 (b) and (c), is particularly appropriate where, as here, the federal constitutional claim arises from the alleged deprivation by state courts of rights created under state law. The Court of Appeals acknowledged that the construction of the statute, plainly a matter for the state courts to decide, was at best uncertain. Obviously, therefore, the state courts can in no sense be said to have arbitrarily denied any right they were asked to accord.

The petition for certiorari and the respondent's motion for leave to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the judgment.

[2] The revised statute by its terms applies only to offenses committed after January 1, 1976. See Ark. Stat. Ann. §§ 41–102 (1) and (3) (1977). The respondent was convicted and sentenced in the trial court in 1975, and the case was reheard by the Arkansas Supreme Court in March 1976, when the court modified his sentence, presumably in accord with the state law then governing the case.

FULLILOVE ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1007. Argued November 27, 1979—Decided July 2, 1980

The "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 (1977 Act) requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Under implementing regulations and guidelines, grantees and their private prime contractors are required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, *inter alia*, the Equal Protection Clause of the Four-

teenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

Held: The judgment is affirmed. Pp. 456–492; 517–522.

584 F. 2d 600, affirmed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE POWELL, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution. Pp. 456–492.

(a) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision and of the administrative program thereunder were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. Pp. 456–472.

(b) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power. Pp. 472–480.

(i) The 1977 Act, as primarily an exercise of Congress' Spending Power under Art. I, § 8, cl. 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the receipt's compliance with federal statutory and administrative directives. Since the reach of the Spending Power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the Spending Power. Pp. 473–475.

(ii) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Pp. 475–476.

(iii) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could con-

clude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., *e. g.*, *Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112. Pp. 476–478.

(iv) Thus, the *objectives* of the MBE provision are within the scope of Congress' Spending Power. Cf. *Lau* v. *Nichols*, 414 U. S. 563. Pp. 479–480.

(c) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 480–492.

(i) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., *e. g.*, *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1; *McDaniel* v. *Barresi*, 402 U. S. 39; *North Carolina Board of Education* v. *Swann*, 402 U. S. 43. Pp. 482–484.

(ii) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 777. Pp. 484–485.

(iii) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. Pp. 485–486.

(iv) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment. Pp. 486–489.

(d) In the continuing effort to achieve the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations. Pp. 490–492.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and

congressionally articulated goal of remedying the present effects of past racial discrimination. Pp. 517–521.

BURGER, C. J., announced the judgment of the Court and delivered an opinion, in which WHITE and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 495. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 517. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 522. STEVENS, J., filed a dissenting opinion, *post*, p. 532.

Robert G. Benisch argued the cause for petitioners Fullilove et al. With him on the briefs was *Robert J. Fink*. *Robert J. Hickey* argued the cause for petitioner General Building Contractors of New York State, Inc., the New York State Building Chapter, Associated General Contractors of America, Inc. With him on the briefs was *Peter G. Kilgore*.

Assistant Attorney General Days argued the cause for respondents. With him on the brief for respondent Secretary of Commerce were *Solicitor General McCree*, *Deputy Solicitor General Wallace*, *Brian K. Landsberg*, *Jessica Dunsay Silver*, and *Vincent F. O'Rourke, Jr.* *Robert Abrams*, Attorney General of New York, *Shirley Adelson Siegel*, Solicitor General, and *Arnold D. Fleischer* and *Barbara E. Levy*, Assistant Attorneys General, filed a brief for respondent State of New York. *Allen G. Schwartz*, *James G. Greilsheimer*, *L. Kevin Sheridan*, and *Frances M. Morris* filed a brief for respondents City of New York et al.*

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*Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness*, *Douglas S. McDowell*, and *Daniel R. Levinson* for the Equal Employment Advisory Council; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Julian B. Wilkins* and *Jewel S. Lafontant* for Alpha Kappa Alpha Sorority, Inc.; by *E. Richard Larson*, *Burt Neuborne*, *Frank Askin*, and *Robert Sedler* for the American Civil Liberties Union et al.; by *Ronald J. Greene* for the American Savings & Loan League, Inc., et al.; by *Bill Lann Lee* for the Asian American Legal Defense and Education Fund, Inc.; by *John B. Jones, Jr.*, *Norman Redlich*, *William L. Robinson*, *Richard T. Seymour*, *Norman J. Chachkin*, *Laurence S. Fordham*, *Henry P. Monaghan*, and

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE POWELL joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94–369, 90 Stat. 999, 42 U. S. C. § 6701 *et seq.* The 1977 amendments authorized an additional $4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has

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Robert D. Goldstein for the Lawyers' Committee for Civil Rights Under Law; by *Vilma S. Martinez, Morris J. Baller,* and *Joel G. Contreras* for the Mexican American/Hispanic Contractors and Truckers Association, Inc., et al.; by *Daniel T. Ingram, Jr.,* for the Minority Contractors Assistance Project, Inc.; by *Nathaniel R. Jones, J. Francis Pohlhaus,* and *John A. Fillion* for the National Association for the Advancement of Colored People et al.; by *Jack Greenberg, James M. Nabrit III, Eric Schnapper, Vernon E. Jordan, Jr.,* and *Robert L. Harris* for the NAACP Legal Defense and Educational Fund, Inc., et al.; and by *Robert T. Pickett* for the National Bar Association, Inc., et al.

Briefs of *amici curiae* were filed by *Arthur Kinoy* for the Affirmative Action Coordinating Center et al.; by *Robert A. Helman, Justin J. Finger, Jeffrey P. Sinensky,* and *Richard A. Weisz* for the Anti-Defamation League of B'nai B'rith; by *Walter R. Echo-Hawk* and *Robert S. Pelcyger* for the Minority Contractors Association, Inc.; and by *Bernard Parks* and *Lenwood A. Jackson* for the National Conference of Black Mayors, Inc.

become the focus of this litigation. Section 103 (f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, requires that: [1]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

In late May 1977, the Secretary promulgated regulations governing administration of the grant program which were amended two months later.[2] In August 1977, the EDA issued guidelines supplementing the statute and regulations with respect to minority business participation in local public works grants,[3] and in October 1977, the EDA issued a technical bulletin promulgating detailed instructions and information to assist grantees and their contractors in meeting the 10% MBE requirement.[4]

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[1] 91 Stat. 116, 42 U. S. C. § 6705 (f)(2) (1976 ed., Supp. II).

[2] 42 Fed. Reg. 27432 (1977), as amended by 42 Fed. Reg. 35822 (1977); 13 CFR Part 317 (1978).

[3] U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program, Round II, Guidelines For 10% Minority Business Participation In LPW Grants (1977) (hereinafter Guidelines); App. 156a–167a.

[4] U. S. Dept. of Commerce, Economic Development Administration, EDA Minority Business Enterprise (MBE) Technical Bulletin (Additional

On November 30, 1977, petitioners filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision. Named as defendants were the Secretary of Commerce, as the program administrator, and the State and City of New York, as actual and potential project grantees. Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement and that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.[5]

After a hearing held the day the complaint was filed, the District Court denied a requested temporary restraining order and scheduled the matter for an expedited hearing on the merits. On December 19, 1977, the District Court issued a memorandum opinion upholding the validity of the MBE program and denying the injunctive relief sought. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (1977).

The United States Court of Appeals for the Second Circuit affirmed, 584 F. 2d 600 (1978), holding that "even under the most exacting standard of review the MBE provision passes constitutional muster." *Id.*, at 603. Considered in the context of many years of governmental efforts to remedy past racial and ethnic discrimination, the court found it

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Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) (1977) (hereinafter Technical Bulletin); App. 129a–155a.

[5] 42 U. S. C. §§ 1981, 1983, 1985; Title VI, § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d; Title VII, § 701 *et seq.* of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

"difficult to imagine" any purpose for the program other than to remedy such discrimination. *Id.*, at 605. In its view, a number of factors contributed to the legitimacy of the MBE provision, most significant of which was the narrowed focus and limited extent of the statutory and administrative program, in size, impact, and duration, *id.*, at 607–608; the court looked also to the holdings of other Courts of Appeals and District Courts that the MBE program was constitutional, *id.*, at 608–609.[6] It expressly rejected petitioners' contention that the 10% MBE requirement violated the equal protection guarantees of the Constitution.[7] *Id.*, at 609.

II

A

The MBE provision was enacted as part of the Public Works Employment Act of 1977, which made various amendments to Title I of the Local Public Works Capital Development and Investment Act of 1976. The 1976 Act was in-

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[6] *Ohio Contractors Assn.* v. *Economic Development Administration*, 580 F. 2d 213 (CA6 1978); *Constructors Assn.* v. *Kreps*, 573 F. 2d 811 (CA3 1978); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338 (RI 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77–4218 (Kan. Feb. 9, 1978); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (SC 1977); *Ohio Contractors Assn.* v. *Economic Development Administration*, 452 F. Supp. 1013 (SD Ohio 1977); *Montana Contractors' Assn.* v. *Secretary of Commerce*, 439 F. Supp. 1331 (Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77–8351 (SD Fla. Nov. 3, 1977); but see *Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (CD Cal. 1977), vacated and remanded for consideration of mootness, 438 U. S. 909 (1978), on remand, 459 F. Supp. 766 (CD Cal.), vacated and remanded *sub nom. Armistead* v. *Associated General Contractors of California*, *post*, p. 908.

[7] Both the Court of Appeals and the District Court rejected petitioners' various statutory arguments without extended discussion. 584 F. 2d, at 608, n. 15; 443 F. Supp., at 262.

tended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities.[8] To accomplish these objectives, the Congress authorized the Secretary of Commerce, acting through the EDA, to make grants to state and local governments for construction, renovation, repair, or other improvement of local public works projects.[9] The 1976 Act placed a number of restrictions on project eligibility designed to assure that federal moneys were targeted to accomplish the legislative purposes.[10] It established criteria to determine grant priorities and to apportion federal funds among political jurisdictions.[11] Those criteria directed grant funds toward areas of high unemployment.[12] The statute authorized the appropriation of up to $2 billion for a period ending in September 1977;[13] this appropriation was soon consumed by grants made under the program.

Early in 1977, Congress began consideration of expanded appropriations and amendments to the grant program. Under administration of the 1976 appropriation, referred to as "Round I" of the local public works program, applicants seeking some $25 billion in grants had competed for the $2 billion in available funds; of nearly 25,000 applications, only some 2,000 were granted.[14] The results provoked widespread

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[8] H. R. Rep. No. 94–1077, p. 2 (1976). The bill discussed in this Report was accepted by the Conference Committee in preference to the Senate version. S. Conf. Rep. No. 94–939, p. 1 (1976); H. R. Conf. Rep. No. 94–1260, p. 1 (1976).

[9] 90 Stat. 999, 42 U. S. C. § 6702.

[10] 90 Stat. 1000, 42 U. S. C. § 6705.

[11] 90 Stat. 1000, 42 U. S. C. § 6707.

[12] 90 Stat. 1001, 42 U. S. C. § 6707 (c).

[13] 90 Stat. 1002, 42 U. S. C. § 6710. The actual appropriation of the full amount authorized was made several weeks later. Pub. L. 94–447, 90 Stat. 1497.

[14] 123 Cong. Rec. 2136 (1977) (remarks of Sen. Randolph).

concern for the fairness of the allocation process.[15] Because the 1977 Act would authorize the appropriation of an additional $4 billion to fund "Round II" of the grant program,[16] the congressional hearings and debates concerning the amendments focused primarily on the politically sensitive problems of priority and geographic distribution of grants under the supplemental appropriation.[17] The result of this attention was inclusion in the 1977 Act of provisions revising the allocation criteria of the 1976 legislation. Those provisions, however, retained the underlying objective to direct funds into areas of high unemployment.[18] The 1977 Act also added new restrictions on applicants seeking to qualify for federal grants;[19] among these was the MBE provision.

The origin of the provision was an amendment to the House version of the 1977 Act, H. R. 11, offered on the floor of the House on February 23, 1977, by Representative Mitchell of Maryland.[20] As offered, the amendment provided:[21]

> "Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business

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[15] See, *e. g.*, Hearings on H. R. 11 and Related Bills before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. (1977); H. R. Rep. No. 95-20 (1977); S. Rep. No. 95-38 (1977).

[16] 91 Stat. 119, 42 U. S. C. § 6710 (1976 ed., Supp. II). The actual appropriation of the full authorized amount was made the same day. Pub. L. 95-29, 91 Stat. 123.

[17] *E. g.*, Hearings, *supra* n. 15; 123 Cong. Rec. 5290-5353 (1977); *id.*, at 7097-7176.

[18] 91 Stat. 117, 42 U. S. C. § 6707 (1976 ed., Supp. II).

[19] 91 Stat. 116, 42 U. S. C. § 6705 (1976 ed., Supp. II).

[20] 123 Cong. Rec. 5097 (1977) (remarks of Rep. Mitchell).

[21] *Id.*, at 5098.

> enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The sponsor stated that the objective of the amendment was to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as then formulated.[22] He cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15–18% of the population.[23] When the amendment was put forward during debate on H. R. 11,[24] Representative Mitchell reiterated the need to ensure that minority firms would obtain a fair opportunity to share in the benefits of this Government program.[25]

The amendment was put forward not as a new concept, but rather one building upon prior administrative practice.

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[22] *Id.*, at 5097–5098.

[23] *Id.*, at 5098.

[24] *Id.*, at 5327. As reintroduced, the first sentence of the amendment was modified to provide:

"Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar volume of each contract shall be set aside for minority business enterprise and, or, unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises."

[25] *Id.*, at 5327–5328.

In his introductory remarks, the sponsor rested his proposal squarely on the ongoing program under § 8 (a) of the Small Business Act, Pub. L. 85–536, § 2, 72 Stat. 389, which, as will become evident, served as a model for the administrative program developed to enforce the MBE provision: [26]

> "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8–A set-aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill."

Although the proposed MBE provision on its face appeared mandatory, requiring compliance with the 10% minority participation requirement "[n]otwithstanding any other provision of law," its sponsor gave assurances that existing administrative practice would ensure flexibility in administration if, with respect to a particular project, compliance with the 10% requirement proved infeasible.[27]

Representative Roe of New Jersey then suggested a change of language expressing the twin intentions (1) that the federal administrator would have discretion to waive the 10% requirement where its application was not feasible, and (2) that the grantee would be mandated to achieve at least 10% participation by minority businesses unless infeasibility was demonstrated.[28] He proposed as a substitute for the first sentence of the amendment the language that eventually was enacted: [29]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per-

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[26] *Id.*, at 5327.

[27] *Id.*, at 5327–5328.

[28] *Id.*, at 5328 (remarks of Rep. Roe).

[29] *Ibid.*

> cent of the amount of each grant shall be expended for minority business enterprises."

The sponsor fully accepted the suggested clarification because it retained the directive that the initial burden of compliance would fall on the grantee. That allocation of burden was necessary because, as he put it, "every agency of the Government has tried to figure out a way to avoid doing this very thing. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it." [30]

Other supporters of the MBE amendment echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities. Representative Conyers of Michigan spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities.[31]

Representative Biaggi of New York then spoke to the need for the amendment to "promote a sense of economic equality in this Nation." He expressed the view that without the amendment, "this legislation may be potentially inequitable to minority businesses and workers" in that it would perpetuate the historic practices that have precluded minority businesses from effective participation in public contracting opportunities.[32] The amendment was accepted by the House.[33]

Two weeks later, the Senate considered S. 427, its package of amendments to the Local Public Works Capital Development and Investment Act of 1976. At that time Senator Brooke of Massachusetts introduced an MBE amendment,

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[30] *Id.*, at 5329 (remarks of Rep. Mitchell).
[31] *Id.*, at 5330 (remarks of Rep. Conyers).
[32] *Id.*, at 5331 (remarks of Rep. Biaggi).
[33] *Id.*, at 5332.

worded somewhat differently than the House version, but aimed at achieving the same objectives.[34] His statement in support of the 10% requirement reiterated and summarized the various expressions on the House side that the amendment was necessary to ensure that minority businesses were not deprived of access to the government contracting opportunities generated by the public works program.[35]

The Senate adopted the amendment without debate.[36] The Conference Committee, called to resolve differences between the House and Senate versions of the Public Works Employment Act of 1977, adopted the language approved by the House for the MBE provision.[37] The Conference Reports added only the comment: "This provision shall be dependent on the availability of minority business enterprises located in the project area." [38]

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise it was thought that repetition of the prior experience could be ex-

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[34] *Id.*, at 7155–7156 (remarks of Sen. Brooke). The first paragraph of Senator Brooke's formulation was identical to the version originally offered by Representative Mitchell, quoted in the text, *supra*, at 458–459. A second paragraph of Senator Brooke's amendment provided:

"This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on those lists." 123 Cong. Rec. 7156 (1977).

[35] *Ibid.*

[36] *Ibid.*

[37] S. Conf. Rep. No. 95–110, p. 11 (1977); H. R. Conf. Rep. No. 95–230, p. 11 (1977).

[38] *Ibid.* The Conference Committee bill was agreed to by the Senate, 123 Cong. Rec. 12941–12942 (1977), and by the House, *id.*, at 13242–13257, and was signed into law on May 13, 1977.

pected, with participation by minority business accounting for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination, but not as relating to lack—as Senator Brooke put it—"of capable and qualified minority enterprises who are ready and willing to work." [39] In the words of its sponsor, the MBE provision was "designed to begin to redress this grievance that has been extant for so long." [40]

B

The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. The sponsors of the MBE provision in the House and the Senate expressly linked the provision to the existing administrative programs promoting minority opportunity in government procurement, particularly those related to § 8 (a) of the Small Business Act of 1953.[41] Section 8 (a) delegates to the Small Business Administration (SBA) an authority and an obligation "whenever it determines such action is necessary" to enter into contracts with any procurement agency of the Federal Government to furnish required goods or services, and, in turn, to enter into subcontracts with small businesses for the performance of such contracts. This authority lay dormant for a decade. Commencing in 1968, however, the SBA was directed by the President [42] to develop a program pursuant to its § 8 (a) authority to assist small

[39] *Id.*, at 7156 (remarks of Sen. Brooke).

[40] *Id.*, at 5330 (remarks of Rep. Mitchell).

[41] *Id.*, at 5327; *id.*, at 7156 (remarks of Sen. Brooke).

[42] Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11518, 3 CFR 907 (1966–1970 Comp.).

business concerns owned and controlled by "socially or economically disadvantaged" persons to achieve a competitive position in the economy.

At the time the MBE provision was enacted, the regulations governing the § 8 (a) program defined "social or economic disadvantage" as follows: [43]

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts. . . ."

The guidelines accompanying these regulations provided that a minority business could not be maintained in the program, even when owned and controlled by members of the identified minority groups, if it appeared that the business had not been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.[44]

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[43] 13 CFR § 124.8–1 (c) (1) (1977).

[44] U. S. Small Business Administration, Office of Business Development, Section 8 (a) Program, Standard Operating Procedure 15–16 (1976); see H. R. Rep. No. 94–468, p. 30 (1975) ("[T]he relevant rules and regulations require such applicant to identify with the disadvantages of his or her racial group generally, and that such disadvantages must have personally affected the applicant's ability to enter into the mainstream of the business system"); U. S. Small Business Administration, Office of Minority Small Business and Capital Ownership Development, MSB & COD Programs, Standard Operating Procedure 20 (1979) ("The social disadvantage of individuals, including those within the above-named [racial and ethnic] groups, shall be determined by SBA on a case-by-case basis. Membership alone in any group is not conclusive that an individual is socially disadvantaged").

As the Congress began consideration of the Public Works Employment Act of 1977, the House Committee on Small Business issued a lengthy Report summarizing its activities, including its evaluation of the ongoing § 8 (a) program.[45] One chapter of the Report, entitled "Minority Enterprises and Allied Problems of Small Business," summarized a 1975 Committee Report of the same title dealing with this subject matter.[46] The original Report, prepared by the House Subcommittee on SBA Oversight and Minority Enterprise, observed: [47]

> "The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees 'equal protection of the laws.' *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially

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[45] H. R. Rep. No. 94–1791 (1977).

[46] *Id.*, at 124–149.

[47] H. R. Rep. No. 94–468, pp. 1–2 (1975) (emphasis added).

or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.*

"*For the purposes of this report the term 'minority' shall include only such minority individuals as are considered to be economically or socially disadvantaged." [48]

The 1975 Report gave particular attention to the § 8 (a) program, expressing disappointment with its limited effectiveness.[49] With specific reference to Government construction contracting, the Report concluded, "there are substantial § 8 (a) opportunities in the area of Federal construction, but . . . the practices of some agencies preclude the realization of this potential." [50] The Subcommittee took "full notice . . . as evidence for its consideration" of reports submitted to the Congress by the General Accounting Office and by the U. S. Commission on Civil Rights, which reflected a similar dissatisfaction with the effectiveness of the § 8 (a) program.[51] The

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[48] Another chapter of the 1977 Report of the House Committee on Small Business summarized a review of the SBA's Security Bond Guarantee Program, making specific reference to minority business participation in the construction industry:

"The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular." H. R. Rep. No. 94–1791, p. 182 (1977), summarizing H. R. Rep. No. 94–840, p. 17 (1976).

[49] H. R. Rep. No. 94–468, pp. 28–30 (1975).

[50] *Id.*, at 29.

[51] *Id.*, at 11; U. S. General Accounting Office, Questionable Effectiveness of the § 8 (a) Procurement Program, GGD–75–57 (1975); U. S. Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975).

Civil Rights Commission report discussed at some length the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state, and local levels.[52] Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.[53]

The Subcommittee Report also gave consideration to the operations of the Office of Minority Business Enterprise, an agency of the Department of Commerce organized pursuant to Executive Orders[54] to formulate and coordinate federal efforts to assist the development of minority businesses. The Report concluded that OMBE efforts were "totally inadequate" to achieve its policy of increasing opportunities for subcontracting by minority businesses on public contracts. OMBE efforts were hampered by a "glaring lack of specific objectives which each prime contractor should be required to achieve," by a "lack of enforcement provisions," and by a "lack of any meaningful monitoring system."[55]

Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.

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[52] *Id.*, at 16–28, 86–88.

[53] *Ibid.*

[54] Exec. Order No. 11458, 3 CFR 779 (1966–1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971–1975 Comp.).

[55] H. R. Rep. No. 94–468, p. 32 (1975). For other congressional observations with respect to the effect of past discrimination on current business opportunities for minorities, see, *e. g.*, H. R. Rep. No. 92–1615, p. 3 (1972); H. R. Rep. No. 95–949, p. 8 (1978); S. Rep. No. 95–1070, pp. 14–15 (1978); S. Rep. No. 96–31, pp. 107, 123–124 (1979); see also, *e. g.*, H. R. Doc. No. 92–169, p. 4 (1971); H. R. Doc. No. 92–194, p. 1 (1972).

C

Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

As required by the Public Works Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

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[56] 91 Stat. 117, 42 U. S. C. § 6706 (1976 ed., Supp. II); 13 CFR Part 317 (1978).

[57] 91 Stat. 116, 42 U. S. C. § 6705 (e)(1) (1976 ed., Supp. II); 13 CFR § 317.19 (1978).

feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the processing of waiver requests, clarifying certain issues left open by the guidelines. It specifies that waivers may be total or partial, depending on

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[58] Guidelines 2–7; App. 157a–160a. The relevant portions of the Guidelines are set out in the Appendix to this opinion, ¶ 1.

[59] Guidelines 2; App. 157a; see 123 Cong. Rec. 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

[60] Guidelines 8; App. 161a.

[61] See 123 Cong. Rec. 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

[62] Guidelines 13–16; App. 165a–167a. The relevant portions of the Guidelines are set out in the Appendix to this opinion, ¶ 2.

the circumstances,[63] and it illustrates the projected operation of the waiver procedure by posing hypothetical questions with projected administrative responses. One such hypothetical is of particular interest, for it indicates the limitations on the scope of the racial or ethnic preference contemplated by the federal program when a grantee or its prime contractor is confronted with an available, qualified, bona fide minority business enterprise who is not the lowest competitive bidder. The hypothetical provides: [64]

> "*Question:* Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?
>
> "*Answer:* It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:
>
> "a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographic location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's cost of doing business or results from discrimination.
>
> "b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price."

This announced policy makes clear the administrative understanding that a waiver or partial waiver is justified (and will

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[63] Technical Bulletin 5; App. 136a.

[64] Technical Bulletin 9–10; App. 143a.

be granted) to avoid subcontracting with a minority business enterprise at an "unreasonable" price, *i. e.*, a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination.

This administrative approach is consistent with the legislative intention. It will be recalled that in the Report of the House Subcommittee on SBA Oversight and Minority Enterprise the Subcommittee took special care to note that when using the term "minority" it intended to include "only such minority individuals as are considered to be economically or socially disadvantaged." [65] The Subcommittee also was cognizant of existing administrative regulations designed to ensure that firms maintained on the lists of bona fide minority business enterprises be those whose competitive position is impaired by the effects of disadvantage and discrimination. In its Report, the Subcommittee expressed its intention that these criteria continue to govern administration of the SBA's § 8 (a) program.[66] The sponsors of the MBE provision, in their reliance on prior administrative practice, intended that the term "minority business enterprise" would be given that same limited application; this even found expression in the legislative debates, where Representative Roe made the point: [67]

> "[W]hen we are talking about companies held by minority groups . . . [c]ertainly people of a variety of backgrounds are included in that. That is not really a measurement. They are talking about people in the minority and deprived."

The EDA Technical Bulletin provides other elaboration of the MBE provision. It clarifies the definition of "minority

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[65] Text accompanying n. 48, *supra*.

[66] H. R. Rep. No. 94-468, p. 30 (1975).

[67] 123 Cong. Rec. 5330 (1977) (remarks of Rep. Roe).

group members." [68] It also indicates EDA's intention "to allow credit for utilization of MBEs only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries." [69] Finally, the Bulletin outlines a procedure for the processing of complaints of "unjust participation by an enterprise or individuals in the MBE program," or of improper administration of the MBE requirement.[70]

III

When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973), we accorded "great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns. See, *e. g.*, *Cleland* v. *National College of Business*, 435 U. S. 213 (1978); *Mathews* v. *De Castro*, 429 U. S. 181 (1976).

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[68] Technical Bulletin 1; App. 131a–132a. These definitions are set out in the Appendix to this opinion, ¶ 3.

[69] Technical Bulletin 3; App. 135a.

[70] Technical Bulletin 19; App. 155a. The relevant portions of the Technical Bulletin are set out in the Appendix to this opinion, ¶ 4.

Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny, and it "is not to say we 'defer' to the judgment of the Congress . . . on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting, supra,* at 103.

The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. The program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity.

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

A

(1)

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U. S.

Const., Art. I, § 8, cl. 1. This Court has recognized that the power to "provide for the . . . general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers. *Buckley* v. *Valeo*, 424 U. S. 1, 90–91 (1976); *United States* v. *Butler*, 297 U. S. 1, 65–66 (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy. *E. g., California Bankers Assn.* v. *Shultz*, 416 U. S. 21 (1974); *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Oklahoma* v. *CSC*, 330 U. S. 127 (1947); *Helvering* v. *Davis*, 301 U. S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

The MBE program is structured within this familiar legislative pattern. The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses, to the extent this can be accomplished by overcoming barriers to access and by awarding contracts to bona fide MBE's. It is further conditioned to require that MBE bids on these contracts are competitively priced, or might have been competitively priced but for the present effects of prior discrimination. Admittedly, the problems of administering this program with respect to these conditions may be formidable. Although the primary responsibility for ensuring minority participation falls upon the grantee, when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party; this is a contractual condition of eligibility for award of the prime contract.

Here we need not explore the outermost limitations on the objectives attainable through such an application of the Spending Power. The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

(2)

We turn first to the Commerce Power. U. S. Const., Art. I, § 8, cl. 3. Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects. *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation. *Ibid.*

It is not necessary that these prime contractors be shown responsible for any violation of antidiscrimination laws. Our cases dealing with application of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, express no doubt of the congressional authority to prohibit practices "challenged as perpetuating the effects of [not unlawful] discrimination occurring prior to the effective date of the Act." *Franks* v.

Bowman Transportation Co., 424 U. S. 747, 761 (1976); see *California Brewers Assn.* v. *Bryant*, 444 U. S. 598 (1980); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(3)

In certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). To avoid such complications, we look to § 5 of the Fourteenth Amendment for the power to regulate the procurement practices of state and local grantees of federal funds. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). A review of our cases persuades us that the objectives of the MBE program are within the power of Congress under § 5 "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.

In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. In *Katzenbach*, the Court upheld § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973b (e), which prohibited application of state English-language literacy requirements to otherwise qualified voters who had completed the sixth grade in an accredited American school in

which a language other than English was the predominant medium of instruction. To uphold this exercise of congressional authority, the Court found no prerequisite that application of a literacy requirement violate the Equal Protection Clause. 384 U. S., at 648–649. It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications within the compass of § 4 (e) would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs. *Id.*, at 652–653.

Four years later, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), we upheld § 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, which imposed a 5-year nationwide prohibition on the use of various voter-qualification tests and devices in federal, state, and local elections. The Court was unanimous, albeit in separate opinions, in concluding that Congress was within its authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. See *City of Rome* v. *United States*, 446 U. S. 156, 176–177 (1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const., Amdt. 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); cf. *City of Rome*, *supra*.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpet-

uated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in *Lau* v. *Nichols*, 414 U. S. 563 (1974). In *Lau*, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.*, at 564–566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin." *Id.*, at 568 (emphasis added). Moreover, we upheld application to the San Francisco school system, as a recipient of federal funds, of a requirement that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." *Ibid.*

It is true that the MBE provision differs from the program approved in *Lau* in that the MBE program directly employs racial and ethnic criteria as a means to accomplish congressional objectives; however, these objectives are essentially the same as those approved in *Lau*. Our holding in *Lau* is instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau*, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement is directed at

the utilization of criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations.

B

We now turn to the question whether, as a *means* to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant. We are mindful that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power," *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 603 (1949) (opinion of Jackson, J.). However, Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

Again, we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress. Furthermore, petitioners have challenged the constitutionality of the MBE provision on its face; they have not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case.[71] In

[71] In their complaint, in order to establish standing to challenge the validity of the program, petitioners alleged as "[s]pecific examples" of economic injury three instances where one of their number assertedly

these circumstances, given a reasonable construction and in light of its projected administration, if we find the MBE program on its face to be free of constitutional defects, it must be upheld as within congressional power. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974); *Fortson* v. *Dorsey*, 379 U. S. 433, 438–439 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964); see *United States* v. *Raines*, 362 U. S. 17, 20–24 (1960).

Our review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree. Pursuant to the administrative program, grantees and their prime contractors are required to seek out all available, qualified, bona fide MBE's; they are required to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's to obtain required working capital, and to give guidance through the intricacies of the bidding process. *Supra*, at 468–469. The program assumes that grantees who undertake these efforts in good faith will obtain at least 10% participation by minority business enterprises. It is recognized that, to achieve this target, contracts will be awarded to available, qualified, bona fide MBE's even though they are not the lowest competitive bidders, so long as their higher bids, when challenged, are found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. *Supra*, at 470–471. There is available to the grantee a provision authorized by Congress for administrative waiver on

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would have been awarded a public works contract but for enforcement of the MBE provision. Petitioners requested only declaratory and injunctive relief against continued enforcement of the MBE provision; they did not seek any remedy for these specific instances of assertedly unlawful discrimination. App. 12a–13a, 17a–19a.

a case-by-case basis should there be a demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program. *Supra*, at 469–470. There is also an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. *Supra*, at 471–472.

(1)

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 18–21 (1971), we rejected this argument in considering a court-formulated school desegregation remedy on the basis that examination of the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971), citing *Swann*, we observed: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." (Citations omitted.) And in *North Carolina Board of Education* v. *Swann*, 402 U. S. 43 (1971), we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46.

In these school desegregation cases we dealt with the authority of a federal court to formulate a remedy for unconstitutional racial discrimination. However, the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations. Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); see *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). In another setting, we have held that a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 147–165 (1977) (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.*, at 180–187 (BURGER, C. J., dissenting on other grounds).

When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary. . . .' [A] federal court is required to tailor 'the scope of the remedy' to fit the nature and extent of the . . . violation." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420 (1977) (quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, at 16).

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance

with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. *Supra*, at 473–480.

(2)

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act. It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business as usual" by public contracting agencies and among prime contractors.

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks*, *supra*, at 777; see *Albemarle Paper Co.*, *supra*; *United Jewish Organizations*, *supra*. The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.[72] Moreover, although we may assume that the com-

[72] The Court of Appeals relied upon Department of Commerce statistics to calculate that the $4.2 billion in federal grants conditioned upon compliance with the MBE provision amounted to about 2.5% of the total

plaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

(3)

Another challenge to the validity of the MBE program is the assertion that it is underinclusive—that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extension would, of course, be appropriate for Congress to provide; it is not a function for the courts.

Even in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). We are not reviewing a federal program that seeks to confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities. Even in such a setting, the Congress is not without a certain authority. See, *e. g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979); *Califano* v. *Webster*, 430 U. S. 313 (1977); *Morton* v. *Mancari*, 417 U. S. 535 (1974).

The Congress has not sought to give select minority groups a preferred standing in the construction industry, but has

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of nearly $170 billion spent on construction in the United States during 1977. Thus, the 10% minimum minority business participation contemplated by this program would account for only 0.25% of the annual expenditure for construction work in the United States. *Fullilove* v. *Kreps*, 584 F. 2d, at 607.

embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. It is not inconceivable that on very special facts a case might be made to challenge the congressional decision to limit MBE eligibility to the particular minority groups identified in the Act. See *Vance* v. *Bradley*, 440 U. S. 93, 109–112 (1979); *Oregon* v. *Mitchell*, 400 U. S., at 240 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). But on this record we find no basis to hold that Congress is without authority to undertake the kind of limited remedial effort represented by the MBE program. Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems.

(4)

It is also contended that the MBE program is overinclusive—that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

This does not mean that the claim of overinclusiveness is entitled to no consideration in the present case. The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

[73] The MBE provision, 42 U. S. C. § 6705 (f)(2) (1976 ed., Supp. II), classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set

eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." *Supra*, at 472. And even as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of past discrimination. *Supra*, at 469–471. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

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out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 803, see 49 CFR § 265.5 (i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." H. R. Rep. No. 94–468, pp. 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See *Steelworkers* v. *Weber*, 443 U. S. 193, 200 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

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[74] Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED–79–9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the program may press the outer limits of congressional authority affords no basis for striking it down.

Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. But as Mr. Justice Jackson admonished in a different context in 1941: [75]

> "The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N. R. A., the A. A. A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only

[75] R. Jackson, The Struggle for Judicial Supremacy 321 (1941).

> temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Mr. Justice Jackson reiterated these thoughts shortly before his death in what was to be the last of his Godkin Lectures: [76]

> "I have said that in these matters the Court must respect the limitations on its own powers because judicial usurpation is to me no more justifiable and no more promising of permanent good to the country than any other kind. So I presuppose a Court that will not depart from the judicial process, will not go beyond resolving cases and controversies brought to it in conventional form, and will not consciously encroach upon the functions of its coordinate branches."

In a different context to be sure, that is, in discussing the latitude which should be allowed to states in trying to meet social and economic problems, Mr. Justice Brandeis had this to say:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion).

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

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[76] R. Jackson, The Supreme Court in the American System of Government 61–62 (1955).

of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

APPENDIX TO OPINION OF BURGER, C. J.

¶ 1. The EDA Guidelines, at 2–7, provide in relevant part:

> "The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available *bona fide* MBE's and make every effort to use as many of them as possible on the project.
>
> "An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of owner-

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[77] Although the complaint alleged that the MBE program violated several federal statutes, n. 5, *supra*, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974); *Preiser* v. *Rodriguez*, 411 U. S. 475, 489–490 (1973); *Bulova Watch Co.* v. *United States*, 365 U. S. 753, 758 (1961); *United States* v. *Borden Co.*, 308 U. S. 188, 198–202 (1939).

ship on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.

"An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW [local public works] project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

". . . [E]very Grantee should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance

to Grantees and prime contractors in fulfilling the 10% MBE requirement. . . .

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

". . . [T]he Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. . . .

. . . . . .

"Only the Grantee can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

. . . . . .

"[A] Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

MR. JUSTICE POWELL, concurring.

Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review

in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) (hereinafter *Bakke*).

The question in this case is whether Congress may enact the requirement in § 103 (f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. *Bakke, supra*, at 299, 305; see *In re Griffiths*, 413 U. S. 717, 721–722 (1973); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). For the reason stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable. Different standards of review applied to different sorts of classifications simply illustrate the principle that some classifications are less likely to be legitimate than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision. See, *e. g.*, *Anderson* v. *Martin*, 375 U. S. 399, 402–404 (1964). In this case, however, I believe that § 103 (f)(2) is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.[1]

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[1] Although racial classifications require strict judicial scrutiny, I do not agree that the Constitution prohibits all racial classification. MR. JUS-

I

Racial preference never can constitute a compelling state interest. "'Distinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia, supra,* at 11, quoting *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943). Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103 (f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination. *Bakke, supra,* at 307; see, *e. g., Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189, 236 (1973) (POWELL, J., concurring in part and dissenting in part); *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971); *North Carolina Board of Education* v. *Swann,* 402 U. S. 43, 45–46 (1971); *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968). The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on account of unlawful . . . discrimination." *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975). A critical inquiry, therefore, is whether § 103 (f)(2) was enacted as a means of redressing such discrimination. But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. *Bakke, supra,* at 307; see, *e. g., Teamsters* v. *United*

TICE STEWART recognizes the principle that I believe is applicable: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Post,* at 523. But, in narrowly defined circumstances, that presumption may be rebutted. Cf. *Lee* v. *Washington,* 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring).

States, 431 U. S. 324, 367–376 (1977); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 155–159 (1977) (opinion of WHITE, J.); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315 (1966).

Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. They were entrusted only with educational functions, and they made no findings of past discrimination. Thus, no compelling governmental interest was present to justify the use of a racial quota in medical school admissions. *Bakke*, *supra*, at 309–310.

Our past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose. *In re Griffiths*, *supra*, at 721–722. In *Bakke*, for example, the state university did have a compelling interest in the attainment of a diverse student body. But the method selected to achieve that end, the use of a fixed admissions quota, was not appropriate. The Regents' quota system eliminated some nonminority applicants from all consideration for a specified number of seats in the entering class, although it allowed minority applicants to compete for all available seats. 438 U. S., at 275–276. In contrast, an admissions program that recognizes race as a factor, but not the sole factor, in assessing an applicant's qualifications serves the university's interest in di-

versity while ensuring that each applicant receives fair and competitive consideration. *Id.*, at 317–318.

In reviewing the constitutionality of § 103 (f)(2), we must decide: (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient findings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination. None of these questions may be answered without explicit recognition that we are reviewing an Act of Congress.

II

The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 257 (1964). In *Katzenbach* v. *McClung*, 379 U. S. 294, 304 (1964), for example, this Court held that Congress had the power under the Commerce Clause to prohibit racial discrimination in public restaurants on the basis of its "finding[s] that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce."

Similarly, after hearing "overwhelming" evidence of private employment discrimination, see H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963), Congress enacted Title VII of the Civil Rights Act of 1964 in order "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). Acting to further the purposes of Title VII Congress vested in the federal courts broad equitable discretion

to ensure that "'persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 764 (1976), quoting Section-by-Section Analysis of H. R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

In addition, Congress has been given the unique constitutional power of legislating to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments.[2] At an early date, the Court stated that "[i]t is the power of Congress which has been enlarged" by the enforcement provisions of the post-Civil War Amendments. *Ex parte Virginia*, 100 U. S. 339, 345 (1880). In *Jones* v. *Alfred H. Mayer & Co.*, 392 U. S. 409, 441–443 (1968), the Court recognized Congress' competence to determine that private action inhibiting the right to acquire and convey real property was racial discrimination forbidden by the Thirteenth Amendment. Subsequently, we held that Congress' enactment of 42 U. S. C. § 1981 pursuant to its powers under the Thirteenth Amendment, see *Runyon* v. *McCrary*, 427 U. S. 160, 168–170, 179 (1976), provides to all persons a federal remedy for racial discrimination in private employment. See *McDonald* v. *Sante Fe Transportation Co.*, 427 U. S. 273, 295–296 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975).

In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), the Court considered whether § 5 of the Fourteenth Amendment gave Congress the power to enact § 4 (e) of the Voting Rights Act of 1965, 42 U. S. C. § 1973b (e). Section 4 (e) provides

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[2] Section 2 of the Thirteenth Amendment, which abolished slavery, provides that "Congress shall have power to enforce this article by appropriate legislation." In virtually identical language, § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment give Congress the power to enforce the provisions of those Amendments.

that no person educated in Puerto Rico may be denied the right to vote in any election for failure to read or write the English language. The Court held that Congress was empowered to enact § 4 (e) as a remedy for discrimination against the Puerto Rican community. 384 U. S., at 652–653. Implicit in its holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination.

Congress' authority to find and provide for the redress of constitutional violations also has been confirmed in cases construing the Enforcement Clause of the Fifteenth Amendment. In *South Carolina* v. *Katzenbach*, 383 U. S., at 308, for example, the Court upheld the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.*, as an appropriate remedy for violations of the Fifteenth Amendment. It noted that Congress had found "insidious and pervasive" discrimination demanding "ster[n] and . . . elaborate" measures. 383 U. S., at 309. Most relevant to our present inquiry was the Court's express approval of Congress' decision to "prescrib[e] remedies for voting discrimination which go into effect without the need for prior adjudication." *Id.*, at 327–328.[3]

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[3] Among the remedies approved in *South Carolina* v. *Katzenbach* was the temporary suspension of literacy tests in some jurisdictions. The Voting Rights Act Amendments of 1970, 42 U. S. C. § 1973aa *et seq.*, temporarily banned the use of literacy tests in all jurisdictions In *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), this Court, speaking through five separate opinions, unanimously upheld that action as a proper exercise of Congress' authority under the post-Civil War Amendments. See *id.*, at 117 (Black, J.); *id.*, at 135 (Douglas, J.); *id.*, at 152 (Harlan, J.); *id.*, at 229 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 281 (STEWART, J., with whom BURGER, C. J. and BLACKMUN, J., concurred). MR. JUSTICE STEWART said:

"Congress was not required to make state-by-state findings concerning . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon

It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects. The next inquiry is whether Congress has made findings adequate to support its determination that minority contractors have suffered extensive discrimination.

III

A

The petitioners contend that the legislative history of § 103 (f)(2) reflects no congressional finding of statutory or constitutional violations. Crucial to that contention is the assertion that a reviewing court may not look beyond the legislative history of the PWEA itself for evidence that Congress believed it was combating invidious discrimination. But petitioners' theory would erect an artificial barrier to full understanding of the legislative process.

Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on § 103 (f)(2) as the complete "record" of congressional decisionmaking underlying that statute is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special

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individual records. The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests." *Id.*, at 284 (citation omitted).

attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of § 103 (f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

B

In my view, the legislative history of § 103 (f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.[4]

[4] I cannot accept the suggestion of the Court of Appeals that § 103 (f)(2) must be viewed as serving a compelling state interest if the reviewing court can "perceive a basis" for legislative action. *Fullilove* v. *Kreps*, 584 F. 2d 600, 604–605 (1978), quoting *Katzenbach* v. *Morgan*, 384 U. S. 641, 656 (1966). The "perceive a basis" standard refers to congressional authority to act, not to the distinct question whether that action violates the Due Process Clause of the Fifth Amendment.

In my view, a court should uphold a reasonable congressional finding of discrimination. A more stringent standard of review would impinge upon Congress' ability to address problems of discrimination, see *supra*, at 500–503; a standard requiring a court to "perceive a basis" is essentially

The opinion of THE CHIEF JUSTICE provides a careful overview of the relevant legislative history, see *ante*, at 456–467, to which only a few words need be added.

Section 103 (f)(2) originated in an amendment introduced on the floor of the House of Representatives by Representative Mitchell. Congressman Mitchell noted that the Federal Government was already operating a set-aside program under § 8 (a) of the Small Business Act, 15 U. S. C. § 637 (a). He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy." 123 Cong. Rec. 5327 (1977).[5] Senator Brooke, who introduced a similar measure in the Senate, reminded the Senate of the special provisions previously enacted into § 8 (a) of the Small Business Act and the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 149, 49 U. S. C. § 1657a, which, he stated, demonstrated the validity of his amendment. 123 Cong. Rec. 7155–7156 (1977).

Section 8 (a) of the Small Business Act provides that the Small Business Administration may enter into contracts with the Federal Government and subcontract them out to small businesses. The Small Business Administration has been directed by Executive Order to employ § 8 (a) to aid socially and economically disadvantaged persons. *Ante*, at 463–464.[6]

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meaningless in this context. Such a test might allow a court to justify legislative action even in the absence of affirmative evidence of congressional findings.

[5] During subsequent debate in the House, Representative Conyers emphasized that minority businesses "through no fault of their own simply have not been able to get their foot in the door." 123 Cong. Rec. 5330 (1977); see *id.*, at 5331 (remarks of Rep. Biaggi).

[6] In 1969, 1970, and 1971, the President issued Executive Orders directing federal aid for minority business enterprises. See Exec. Order No.

The operation of the § 8 (a) program was reviewed by congressional Committees between 1972 and 1977. In 1972, the House Subcommittee on Minority Small Business Enterprise found that minority businessmen face economic difficulties that "are the result of past social standards which linger as characteristics of minorities as a group." H. R. Rep. No. 92–1615, p. 3 (1972). In 1975, the House Subcommittee on SBA Oversight and Minority Enterprise concluded that "[t]he effect of past inequities stemming from racial prejudice have not remained in the past," and that low participation by minorities in the economy was the result of "past discriminatory practices." H. R. Rep. No. 94–468, pp. 1–2 (1975). In 1977, the House Committee on Small Business found that

> "over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." H. R. Rep. No. 94–1791, p. 182 (1977).

11458, 3 CFR 779 (1966–1970 Comp.); Exec. Order No. 11518, 3 CFR 907 (1966–1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971–1975 Comp.). The President noted that "members of certain minority groups through no fault of their own have been denied the full opportunity to [participate in the free enterprise system]," Exec. Order No. 11518, 3 CFR 908 (1966–1970 Comp.), and that the "opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice." Exec. Order No. 11625, 3 CFR 616 (1971–1975 Comp.). Assistance to minority business enterprises through the § 8 (a) program has been designed to promote the goals of these Executive Orders. *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F. 2d 696, 706 (CA5 1973), cert. denied, 415 U. S. 914 (1974).

The Committee's Report was issued on January 3, 1977, less than two months before Representative Mitchell introduced § 103 (f)(2) into the House of Representatives.[7]

In light of these legislative materials and the discussion of legislative history contained in THE CHIEF JUSTICE's opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. Refusals to subcontract work to minority contractors may, depending upon the identity of the discriminating party, violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, or 42 U. S. C. § 1981, or the Fourteenth Amendment. Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that "Congress may paint with a much broader brush than may this Court. . . ." *Oregon* v. *Mitchell*, 400 U. S. 112, 284 (1970) (STEWART, J., concurring in part and dissenting in part).[8]

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[7] Two sections of the Railroad Revitalization and Regulatory Reform Act also reflect Congress' recognition of the need for remedial steps on behalf of minority businesses. Section 905, 45 U. S. C. § 803, prohibits discrimination in any activity funded by the Act, and § 906, 49 U. S. C. § 1657a, establishes a Minority Resource Center to assist minority businessmen to obtain contracts and business opportunities related to the maintenance and rehabilitation of railroads. The provisions were enacted by a Congress that recognized the "established national policy, since at least the passage of the Civil Rights Act of 1964, to encourage and assist in the development of minority business enterprise." S. Rep. No. 94-499, p. 44 (1975) (Commerce Committee). In January 1977, the Department of Transportation issued regulations pursuant to 45 U. S. C. § 803 (d) that require contractors to formulate affirmative-action programs to ensure that minority businesses receive a fair proportion of contract opportunities. See 49 CFR §§ 265.9–265.17 (1978). See also nn. 11 and 12, *infra*.

[8] Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, Congress need not be content with findings that merely meet constitutional standards. Race-conscious remedies, popularly referred to as affirmative-action

IV

Under this Court's established doctrine, a racial classification is suspect and subject to strict judicial scrutiny. As noted in Part I, the government may employ such a classification only when necessary to accomplish a compelling governmental purpose. See *Bakke*, 438 U. S., at 305. The conclusion that Congress found a compelling governmental interest in redressing identified discrimination against minority contractors therefore leads to the inquiry whether use of a 10% set-aside is a constitutionally appropriate means of serving that interest. In the past, this "means" test has been virtually impossible to satisfy. Only two of this Court's modern cases have held the use of racial classifications to be constitutional. See *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Hirabayshi* v. *United States*, 320 U. S. 81 (1943). Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

A

Application of the "means" test necessarily demands an understanding of the type of congressional action at issue. This is not a case in which Congress has employed a racial classification solely as a means to confer a racial preference. Such a purpose plainly would be unconstitutional. *Supra,*

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programs, almost invariably affect some innocent persons. See *infra*, at 514. Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. See *Bakke*, 438 U. S. 265, 319, n. 53 (1978); J. Wilkinson, From *Brown* to *Bakke* 264–266 (1979); Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1048–1049 (1979). It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fairminded people that the congressional action is just.

at 497. Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a nonracial means should be available to further the legitimate governmental purpose. See *Bakke, supra,* at 310–311.

Enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination. As this Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race. See, *e. g., North Carolina Board of Education* v. *Swann,* 402 U. S., at 45–46. Although federal courts may not order or approve remedies that exceed the scope of a constitutional violation, see *Milliken* v. *Bradley,* 433 U. S. 267, 280–281 (1977); *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Austin Independent School District* v. *United States,* 429 U. S. 990, 991 (1976) (POWELL, J., concurring), this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 794 (POWELL, J., concurring in part and dissenting in part).

I believe that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination. The legislative history of § 5 of the Fourteenth Amendment is particularly instructive. Senator Howard, the member of the Joint Committee on Reconstruction who introduced the Amendment into the Senate, described § 5 as "a direct affirmative delegation of power to Congress to carry out all the principles of all [the] guarantees" of § 1 of the Amendment. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866). Furthermore, he stated that § 5

> "casts upon the Congress the responsibility of seeing to it, for the future, that all the sections of the amendment

> are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon the Congress this power and this duty." *Id.*, at 2768.

Senator Howard's emphasis on the importance of congressional action to effectuate the goals of the Fourteenth Amendment was echoed by other Members of Congress. Representative Stevens, also a member of the Reconstruction Committee, said that the Fourteenth Amendment "allows Congress to correct the unjust legislation of the States," *id.*, at 2459, and Senator Poland wished to leave no doubt "as to the power of Congress to enforce principles lying at the very foundation of all republican government. . . ." *Id.*, at 2961. See *id.*, at 2512–2513 (remarks of Rep. Raymond); *id.*, at 2511 (Rep. Eliot); *Ex parte Virginia*, 100 U. S., at 345.[9]

Although the Framers of the Fourteenth Amendment may have contemplated that Congress, rather than the federal courts, would be the prime force behind enforcement of the Fourteenth Amendment, see 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, Part 1, pp. 1295, 1296 (1971), they did not believe that congressional action would be unreviewable by this Court. Several Members of Congress emphasized that a primary purpose of the Fourteenth Amendment was to place the provisions of the Civil Rights Act of 1866 "in the eternal firmament of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2462 (1866) (remarks of Rep. Garfield). See *id.*, at 2459 (remarks of Rep. Stevens); *id.*, at 2465 (remarks of Rep. Thayer); *id.*, at 2498 (remarks of Rep. Broomall). By 1866, Members of Congress fully understood that judicial review was the means by which action of the Legislative and Execu-

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[9] See also *Jones* v. *Alfred H. Mayer & Co.*, 392 U. S. 409, 440–441 (1968), quoting Cong. Globe, 39th Cong., 1st Sess., 322 (1866) (remarks of Sen. Trumbull on Congress' authority under the Thirteenth Amendment).

tive Branches would be required to conform to the Constitution. See, *e. g., Marbury* v. *Madison,* 1 Cranch 137 (1803).

I conclude, therefore, that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of these Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy. Courts must be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well. I believe that Congress' choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.

B

When reviewing the selection by Congress of a race-conscious remedy, it is instructive to note the factors upon which the Courts of Appeals have relied in a closely analogous area. Courts reviewing the proper scope of race-conscious hiring remedies have considered (i) the efficacy of alternative remedies, *NAACP* v. *Allen,* 493 F. 2d 614, 619 (CA5 1974); *Vulcan Society Inc.* v. *Civil Service Comm'n,* 490 F. 2d 387, 398 (CA2 1973), (ii) the planned duration of the remedy, *id.,* at 399; *United States* v. *Wood, Wire & Metal Lathers Local 46,* 471 F. 2d 408, 414, n. 12 (CA2), cert. denied, 412 U. S. 939 (1973), (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, *Association Against Discrimination* v. *Bridgeport,* 594 F. 2d 306, 311 (CA2 1979); *Boston Chapter NAACP* v. *Beecher,* 504 F. 2d 1017, 1026–1027 (CA1 1974), cert. denied,

421 U. S. 910 (1975); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1341 (CA2 1973), cert. denied, 421 U. S. 991 (1975); *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (CA8) (en banc), cert. denied, 406 U. S. 950 (1972), and (iv) the availability of waiver provisions if the hiring plan could not be met, *Associated General Contractors, Inc.* v. *Altshuler*, 490 F. 2d 9, 18–19 (CA1 1973), cert. denied, 416 U. S. 957 (1974).

By the time Congress enacted § 103 (f)(2) in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts. See 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). Congress also knew that economic recession threatened the construction industry as a whole. Section 103 (f)(2) was enacted as part of a bill designed to stimulate the economy by appropriating $4 billion in federal funds for new public construction. Since the emergency public construction funds were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

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[10] The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 U. S. C. § 6707 (h)(1) (1976 ed., Supp. II). Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to begin within 90 days of project approval, § 6705 (d).

[11] In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See H. R. Rep. No. 92–1615, p. 3 (1972) (Select Committee on

ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emer-

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Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." *Id.*, at 3–4.

[12] When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong. Rec. 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 163 (CA3), cert. denied, 404 U. S. 854 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong. Rec. 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. *Id.*, at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See *id.*, at 40740 (remarks of Sen. Scott); *id.*, at 40741 (remarks of

gency legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

The § 103 (f)(2) set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate. It will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts § 103 (f)(2).

The percentage chosen for the set-aside is within the scope of congressional discretion. The Courts of Appeals have approved temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population. *Boston Chapter NAACP* v. *Beecher*, 504 F. 2d, at 1027; *Bridgeport Guardians, Inc.* v. *Bridgeport*, 482 F. 2d, at 1341; *Carter* v. *Gallagher*, 452 F. 2d, at 331. Only 4% of contractors are members of minority groups, see *Fullilove* v. *Kreps*, 584 F. 2d 600, 608 (CA2 1978), although minority group members constitute about 17% of the national population, see *Constructors Association of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 951 (WD Pa. 1977), aff'd, 573 F. 2d 811 (CA3 1978). The choice of a 10% set-aside thus falls roughly halfway

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Sen. Griffith); *id.*, at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. *Id.*, at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." *Id.*, at 41072.

between the present percentage of minority contractors and the percentage of minority group members in the Nation.

Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision into § 103 (f)(2). The factors governing issuance of a waiver include the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors. U. S. Dept. of Commerce, Local Public Works Program, Round II, Guidelines for 10% Minority Business Participation LPW Grants (1977); App. 165a–167a. We have been told that 1,261 waivers had been granted by September 9, 1979. Brief for Secretary of Commerce 62, n. 37.

C

A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties. See *Teamsters* v. *United States*, 431 U. S., at 374–375. In this case, the petitioners contend with some force that they have been asked to bear the burden of the set-aside even though they are innocent of wrongdoing. I do not believe, however, that their burden is so great that the set-aside must be disapproved. As noted above, Congress knew that minority contractors were receiving only 1% of federal contracts at the time the set-aside was enacted. The PWEA appropriated $4 billion for public work projects, of which it could be expected that approximately $400 million would go to minority contractors. The Court of Appeals calculated that the set-aside would reserve about 0.25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation's contractors who are members of a minority group. 584 F. 2d., at 607–608. The set-aside would have

no effect on the ability of the remaining 96% of contractors to compete for 99.75% of construction funds. In my view, the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness.[13]

Consideration of these factors persuades me that the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the governmental interest served by § 103 (f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose. Whatever the exact breadth of that discretion, I believe that it encompasses the selection of the set-aside in this case.[14]

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[13] Although I believe that the burden placed upon nonminority contractors is not unconstitutional, I reject the suggestion that it is legally irrelevant. Apparently on the theory that Congress could have enacted no set-aside and provided $400 million less in funding, the Secretary of Commerce argues that "[n]onminorities have lost no right or legitimate expectation by the addition of Section 103 (f)(2) to the 1976 Act." Brief for Secretary of Commerce 61. But the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled. Cf. *Califano* v. *Goldfarb*, 430 U. S. 199, 210–212 (1977) (opinion of BRENNAN, J.); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment").

[14] Petitioners have suggested a variety of alternative programs that could be used in order to aid minority business enterprises in the construction industry. My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional. See *Bakke*, 438 U. S., at 309–310. The degree of specificity required in the findings of discrimination and the breadth of

V

In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Dred Scott* v. *Sandford*, 19 How. 393 (1857). At least since the decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task. When we first confronted such an issue in *Bakke*, I concluded that the Regents of the University of California were not competent to make, and had not made, findings sufficient to uphold the use of the race-conscious remedy they adopted. As my opinion made clear, I believe that the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be. But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where

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discretion in the choice of remedies may vary with the nature and authority of a governmental body.

Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate § 103 (f)(2).[15]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *University of California Regents* v. *Bakke*, 438 U. S. 265, 324–379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion.[1]

I

In *Bakke*, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment." *Id.*, at 356 (opinion concurring in judgment in part and dissenting in part) (hereinafter cited as joint separate opinion).[2] We acknowledged that "a

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[15] Petitioners also contend that § 103 (f)(2) violates Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* Because I believe that the set-aside is constitutional, I also conclude that the program does not violate Title VI. See *Bakke*, 438 U. S., at 287 (opinion of POWELL, J.); *id.*, at 348–350 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

[1] On the authority of *Bakke*, it is also clear to me that the set-aside provision does not violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* In *Bakke* five Members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment. See 438 U. S., at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 287 (opinion of POWELL, J.).

[2] In *Bakke*, the issue was whether a special minority admissions program of a state medical school violated the Equal Protection Clause of the Fourteenth Amendment. In the present case, the issue is whether the minority set-aside provision violates the equal protection component of

government practice or statute which . . . contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Id.*, at 357. Thus, we reiterated the traditional view that racial classifications are prohibited if they are irrelevant. *Ibid.* In addition, we firmly adhered to "the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." *Id.*, at 357–358.

We recognized, however, that these principles outlawing the irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination.[3] Such classifications may disadvantage some whites, but whites as a class lack the " 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Id.*, at 357 (quoting *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973)). See also *United States* v. *Carolene Products Co.*, 304 U. S.

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the Due Process Clause of the Fifth Amendment. As noted in *Bakke*, " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " *Id.*, at 367, n. 43 (joint separate opinion) (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976) (*per curiam*)).

[3] In *Bakke*, the Medical School of the University of California at Davis had adopted a special admissions program in which 16 out of the 100 places in each entering class were reserved for disadvantaged minorities. A major purpose of this program was to ameliorate the present effects of past racial discrimination. See 438 U. S., at 362 (joint separate opinion); *id.*, at 305–306 (opinion of POWELL, J.).

144, 152, n. 4 (1938). Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny"—scrutiny that is strict in theory, but fatal in fact. *Bakke, supra,* at 362 (joint separate opinion).

Nor did we determine that such programs should be analyzed under the minimally rigorous rational-basis standard of review. 438 U. S., at 358. We recognized that race has often been used to stigmatize politically powerless segments of society, and that efforts to ameliorate the effects of past discrimination could be based on paternalistic stereotyping, not on a careful consideration of modern social conditions. In addition, we acknowledged that governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility. *Id.,* at 360–361.

We concluded, therefore, that because a racial classification ostensibly designed for remedial purposes is susceptible to misuse, it may be justified only by showing "an important and articulated purpose for its use." *Id.,* at 361. "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Ibid.* In our view, then, the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives. *Id.,* at 359.

II

Judged under this standard, the 10% minority set-aside provision at issue in this case is plainly constitutional. Indeed, the question is not even a close one.

As MR. CHIEF JUSTICE BURGER demonstrates, see *ante*, at 456–467, it is indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination. See also the concurring opinion of my Brother POWELL, *ante*, at 503–506. Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination. Here, as in *Bakke*, 438 U. S., at 362 (joint separate opinion), "minority underrepresentation is substantial and chronic, and . . . the handicap of past discrimination is impeding access of minorities to" the benefits of the governmental program. In these circumstances remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classification. *Ibid.* See generally *id.*, at 362–373.[4]

Because the means chosen by Congress to implement the set-aside provision are substantially related to the achieve-

[4] Petitioners argue that the set-aside is invalid because Congress did not create a sufficient legislative record to support its conclusion that racial classifications were required to ameliorate the present effects of past racial discrimination. In petitioners' view, Congress must make particularized findings that past violations of the Equal Protection Clause and antidiscrimination statutes have a current effect on the construction industry.

This approach is fundamentally misguided. Unlike the courts, Congress is engaged in the broad mission of framing general social rules, not adjudicating individual disputes. Our prior decisions recognize Congress' authority to "require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination." *Bakke*, 438 U. S., at 366 (joint separate opinion).

See also *ante*, at 478; the concurring opinion of my Brother POWELL, *ante*, at 502–503.

ment of its remedial purpose, the provision also meets the second prong of our *Bakke* test. Congress reasonably determined that race-conscious means were necessary to break down the barriers confronting participation by minority enterprises in federally funded public works projects. That the set-aside creates a quota in favor of qualified and available minority business enterprises does not necessarily indicate that it stigmatizes. As our opinion stated in *Bakke*, "[f]or purposes of constitutional adjudication, there is no difference between" setting aside "a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants." *Id.*, at 378. The set-aside, as enacted by Congress and implemented by the Secretary of Commerce, is carefully tailored to remedy racial discrimination while at the same time avoiding stigmatization and penalizing those least able to protect themselves in the political process. See *ante*, at 480–489. Cf. the concurring opinion of my Brother POWELL, *ante*, at 508–515. Since under the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work, the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it. Nor does the set-aside "establish a quota in the invidious sense of a ceiling," *Bakke, supra*, at 375 (joint separate opinion), on the number of minority firms that can be awarded public works contracts. In addition, the set-aside affects only a miniscule amount of the funds annually expended in the United States for construction work. See *ante*, at 484–485, n. 72.

In sum, it is clear to me that the racial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination. The provision, therefore, passes muster under the equal protection standard I adopted in *Bakke*.

III

In my separate opinion in *Bakke*, 438 U. S., at 387–396, I recounted the "ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment." *Id.*, at 387, 395. I there stated:

> "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors." *Id.*, at 401–402.

Those doors cannot be fully opened without the acceptance of race-conscious remedies. As my Brother BLACKMUN observed in *Bakke:* "In order to get beyond racism, we must first take account of race. There is no other way." *Id.*, at 407 (separate opinion).

Congress recognized these realities when it enacted the minority set-aside provision at issue in this case. Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric. I applaud this result. Accordingly, I concur in the judgment of the Court.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man

as man, and takes no account of his surroundings or of his color. . . ." Those words were written by a Member of this Court 84 years ago. *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of legislative power and had been "enacted in good faith for the promotion [of] the public good. . . ." *Id.*, at 550. Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," for much the same reasons. I think today's decision is wrong for the same reason that *Plessy* v. *Ferguson* was wrong, and I respectfully dissent.

A

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U. S. 1, 10; *Hill* v. *Texas*, 316 U. S. 400; *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308; *Slaughter-House Cases*, 16 Wall. 36, 71–72. And that standard must be met by the United States itself under the Due Process Clause of the Fifth Amendment. *Washington* v. *Davis*, 426 U. S. 229, 239; *Bolling* v. *Sharpe*, 347 U. S. 497.[1] Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid. *McLaughlin* v. *Florida*, 379 U. S. 184, 192; *Bolling* v. *Sharpe*, *supra*, at 499; *Korematsu* v. *United States*, 323 U. S. 214, 216.[2]

[1] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U. S. 1, 93.

[2] By contrast, nothing in the Constitution prohibits a private person from discriminating on the basis of race in his personal or business affairs. See *Steelworkers* v. *Weber*, 443 U. S. 193. The Fourteenth Amendment

The hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court. See, *e. g.*, *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*; *Brown* v. *Board of Education*, 347 U. S. 483; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337. And our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims. In *Anderson* v. *Martin*, 375 U. S. 399, for instance, the Court dealt with a state law that required that the race of each candidate for election to public office be designated on the nomination papers and ballots. Although the law applied equally to candidates of whatever race, the Court held that it nonetheless violated the constitutional standard of equal protection. "We see *no relevance*," the Court said, "in the State's pointing up the race of the candidate as bearing upon his qualifications for office." *Id.*, at 403 (emphasis added). Similarly, in *Loving* v. *Virginia*, *supra*, and *McLaughlin* v. *Florida*, *supra*, the Court held that statutes outlawing miscegenation and interracial cohabitation were constitutionally invalid, even though the laws penalized all violators equally. The laws were unconstitutional for the simple reason that they penalized individuals solely because of their race, whatever their race might be. See also *Goss* v. *Board of Education*, 373 U. S. 683; *Buchanan* v. *Warley*, 245 U. S. 60.[3]

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limits only the actions of the States; the Fifth Amendment limits only the actions of the National Government.

[3] *University of California Regents* v. *Bakke*, 438 U. S. 265, and *United Jewish Organizations* v. *Carey*, 430 U. S. 144, do not suggest a different rule. The Court in *Bakke* invalidated the racially preferential admissions program that had deprived Bakke of equal access to a place in the medical school of a state university. In *United Jewish Organizations* v. *Carey*, a state legislature had apportioned certain voting districts with an awareness of their racial composition. Since the plaintiffs there had "failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race," no

This history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race.[4] The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100, quoted in *Loving* v. *Virginia*, *supra*, at 11.[5]

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constitutional violation had occurred. 430 U. S., at 179–180 (concurring opinion). No person in that case was deprived of his electoral franchise.

More than 35 years ago, during the Second World War, this Court did find constitutional a governmental program imposing injury on the basis of race. See *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81. Significantly, those cases were decided not only in time of war, but also in an era before the Court had held that the Due Process Clause of the Fifth Amendment imposes the same equal protection standard upon the Federal Government that the Fourteenth Amendment imposes upon the States. See *Bolling* v. *Sharpe*, 347 U. S. 497.

[4] A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. See *Teamsters* v. *United States*, 431 U. S. 324; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 18–32. But such a judicial decree, following litigation in which a violation of law has been determined, is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients. See text in Part B, *infra*.

[5] As Mr. Justice Murphy wrote in dissenting from the Court's opinion and judgment in *Korematsu* v. *United States*, *supra*, at 242:

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."

See also *DeFunis* v. *Odegaard*, 416 U. S. 312, 331–344 (Douglas, J., dissenting); A. Bickel, The Morality of Consent 132–133 (1975).

In short, racial discrimination is by definition individious discrimination.

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. See *In re Griffiths*, 413 U. S. 717; *Hernandez* v. *Texas*, 347 U. S. 475; *Truax* v. *Raich*, 239 U. S. 33, 39–43; *Strauder* v. *West Virginia*, 100 U. S., at 308. The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment: "No State shall . . . deny to *any* person . . . the equal protection of the laws." Nothing in this language singles out some "persons" for more "equal" treatment than others. Rather, as the Court made clear in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, the benefits afforded by the Equal Protection Clause "are, by its terms, guaranteed to the individual. [They] are personal rights." From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.

No one disputes the self-evident proposition that Congress has broad discretion under its spending power to disburse the revenues of the United States as it deems best and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under § 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of that Amendment. But these self-evident truisms do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their

powers. If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States.

B

On its face, the minority business enterprise (MBE) provision at issue in this case denies the equal protection of the law. The Public Works Employment Act of 1977 directs that all project construction shall be performed by those private contractors who submit the lowest competitive bids and who meet established criteria of responsibility. 42 U. S. C. § 6705 (e) (1) (1976 ed., Supp. II). One class of contracting firms—defined solely according to the racial and ethnic attributes of their owners—is, however, excepted from the full rigor of these requirements with respect to a percentage of each federal grant. The statute, on its face and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit, and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids.

The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.[6]

But even assuming that Congress has the power, under § 5 of the Fourteenth Amendment or some other constitutional pro-

[6] See n. 4, *supra*. In *McDaniel* v. *Barresi*, 402 U. S. 39, the Court approved a county's voluntary race-conscious redrafting of its public school pupil assignment system in order to eliminate the effects of past unconstitutional racial segregation of the pupils. But no pupil was deprived of a public school education as a result.

vision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds. The MBE provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch.[7] And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424.

The provision at issue here does not satisfy this condition. Its legislative history suggests that it had at least two other objectives in addition to that of counteracting the effects of past or present racial discrimination in the public works construction industry.[8] One such purpose appears to have been to as-

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[7] Section 2 of the Thirteenth Amendment gives Congress the authority to "enforce" the provisions of § 1 of the same Amendment, and § 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Neither section grants to Congress the authority to require the States to flout their obligation under § 1 of the Fourteenth Amendment to afford "the equal protection of the laws" or the power to enact legislation that itself violates the equal protection component of the Fifth Amendment.

[8] The legislative history of the MBE provision itself contains not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination. From the context of the Act, however, it is reasonable to infer that the program was enacted, at least in part, to remedy perceived past and present racial discrimination. In 1977, Congress knew that many minority business enterprises had historically suffered racial discrimination in the economy as a whole and in the construction industry in particular. See H. R. Rep. No. 94–1791, pp. 182–183 (1977); H. R. Rep. No. 94–468, pp. 1–2 (1975); To Amend and Extend the Local Public Works Capital Development and Investment Act: Hearings on H. R. 11 and Related Bills before the Subcommittee on Economic Development of the House Committee on Public Works and

sure to minority contractors a certain percentage of federally funded public works contracts.[9] But, since the guarantee of equal protection immunizes from capricious governmental treatment "persons"—not "races"—it can never countenance laws that seek racial balance as a goal in and of itself. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *University of California Regents* v. *Bakke*, 438 U. S. 265, 307 (opinion of POWELL, J.). Second, there are indications that the MBE provision may have been enacted to compensate for the effects of social, educational, and economic "disadvantage."[10] No race, however, has a monopoly on social, educational, or eco-

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Transportation, 95th Cong., 1st Sess., 939 (1977) (statement of Rep. Conyers). Some of this discrimination may well, in fact, have violated one or more of the state and federal antidiscrimination laws.

[9] See 123 Cong. Rec. 5327 (1977) (Rep. Mitchell) ("all [the MBE provision] attempts to do is to provide that those who are in minority businesses get a *fair share of the action* from this public works legislation") (emphasis supplied). Moreover, sponsors of the legislation repeatedly referred to the low participation rate of minority businesses in federal procurement programs. See *id.*, at 5331 (Rep. Biaggi); *id.*, at 5327–5328 (Rep. Mitchell); *id.*, at 5097–5098 (Rep. Mitchell); *id.*, at 7156 (Sen. Brooke).

[10] See *id.*, at 5330 (Rep. Conyers) ("minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time. The bidding process is one whose intricacies defy the imaginations of most of us here"). That the elimination of "disadvantage" is one of the program's objectives is an inference that finds support in the agency's own interpretation of the statute. See U. S. Dept. of Commerce, Economic Development Administration, EDA Minority Business Enterprise Technical Bulletin (Additional Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) 9–10 (1977) (Technical Bulletin) ("a [minority] subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from *disadvantage* which affects the MBE's costs of doing business *or* results from *discrimination*" (emphasis added)).

nomic disadvantage,[11] and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection. Since the MBE provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could.[12]

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[11] For instance, in 1978, 83.4% of persons over the age of 25 who had not completed high school were "white," see U. S. Dept. of Commerce Bureau of the Census, Statistical Abstract of the United States 145 (1979), and in 1977, 79.0% of households with annual incomes of less than $5,000 were "white," see *id.*, at 458.

[12] Moreover, even a properly based judicial decree will be struck down if the scope of the remedy it provides is not carefully tailored to fit the nature and extent of the violation. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420; *Milliken* v. *Bradley*, 418 U. S. 717. Here, assuming that the MBE provision was intended solely as a remedy for past and present racial discrimination, it sweeps far too broadly. It directs every state and local government covered by the program to set aside 10% of its grant for minority business enterprises. Waivers from that requirement are permitted, but only where insufficient numbers of minority businesses capable of doing the work at nonexorbitant prices are located in the relevant contracting area. No waiver is provided for any governmental entity that can prove a history free of racial discrimination. Nor is any exemption permitted for nonminority contractors that are able to demonstrate that they have not engaged in racially discriminatory behavior. Finally, the statute makes no attempt to direct the aid it provides solely toward those minority contracting firms that arguably still suffer from the effects of past or present discrimination.

These are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.

C

The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each State regardless of the color of his skin. The Amendment promised to carry to its necessary conclusion a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage.[13] Tragically, the promise of 1868 was not immediately fulfilled, and decades passed before the States and the Federal Government were finally directed to eliminate detrimental classifications based on race. Today, the Court derails this achievement and places its imprimatur on the creation once again by government of privileges based on birth.

The Court, moreover, takes this drastic step without, in my opinion, seriously considering the ramifications of its decision. Laws that operate on the basis of race require definitions of race. Because of the Court's decision today, our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.[14] Moreover, racial discrimination, even "good faith" racial discrimination, is inevitably a two-edged sword. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *University of California Regents* v. *Bakke*, *supra*, at 298 (opin-

[13] The Framers of our Constitution lived at a time when the Old World still operated in the shadow of ancient feudal traditions. As products of the Age of Enlightenment, they set out to establish a society that recognized no distinctions among white men on account of their birth. See U. S. Const., Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). The words Thomas Jefferson wrote in 1776 in the Declaration of Independence, however, contained the seeds of a far broader principle: "We hold these truths to be self-evident: that all men are created equal. . . ."

[14] See Technical Bulletin, *supra*, n. 10, at 1. Cf. Ga. Code § 53–312 (1937); Tex. Penal Code, Art. 493 (Vernon 1938).

ion of POWELL, J.). Most importantly, by making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.[15] See *Hughes* v. *Superior Court*, 339 U. S. 460, 463–464; T. Eastland & W. Bennett, Counting by Race 139–170 (1979); Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979).

There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even "temporarily" and not even as an "experiment."

For these reasons, I would reverse the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

The 10% set-aside contained in the Public Works Employment Act of 1977 (Act), 91 Stat. 116, creates monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the entrepreneurial subclass—those who have, or can borrow, working capital.

History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more

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[15] "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 277 U. S. 438, 485 (Brandeis, J., dissenting).

than the high prices and shoddy workmanship that are familiar handmaidens of monopoly; they engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in 18th-century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "égalité" and "fraternité." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

Our historic aversion to titles of nobility [1] is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially.[2] When government accords different treatment to different persons, there must be a reason for the difference.[3] Because racial

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[1] "Such pure discrimination is most certainly not a 'legitimate purpose' for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi* v. *United States*, 320 U. S. 81, 100. From its inception, the Federal Government has been directed to treat all its citizens as having been 'created equal' in the eyes of the law. The Declaration of Independence states:

" 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

"And the rationale behind the prohibition against the grant of any title of nobility by the United States, see U. S. Const., Art. I, § 9, cl. 8, equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth." *Mathews* v. *Lucas*, 427 U. S. 495, 520–521, n. 3 (STEVENS, J., dissenting).

[2] "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100.

See also *Harris* v. *McRae*, *ante*, at 349, 356–357 (STEVENS, J., dissenting); *Craig* v. *Boren*, 429 U. S. 190, 211 (STEVENS, J., concurring).

[3] "As a matter of principle and in view of my attitude toward the equal

characteristics so seldom provide a relevant basis for disparate treatment,[4] and because classifications based on race are potentially so harmful to the entire body politic,[5] it is espe-

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protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purposes. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance." *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 115 (Jackson, J., concurring).

[4] "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizens, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, *supra*, at 520–521 (STEVENS, J., dissenting) (footnote omitted).

[5] Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals. The so-called guidelines developed by the Economic Development Administration, see the appendix to the opinion of THE CHIEF JUSTICE, ¶ 3, *ante*, at 494–495, are so general as to be fairly innocuous; as a consequence they are too vague to be useful. For example, it is unclear whether the firm described in n. 16, *infra*, would be eligible for the 10% set-aside. If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8–9 (1946):

"On the basis of Article 3, Reichs Citizenship Law, of 15 Sept. 1935 (RGBl. I, page 146) the following is ordered:

. . . . . .

"Article 5

"1. A Jew is anyone who descended from at least three grandparents who were racially full Jews. Article 2, par. 2, second sentence will apply.

"2. A Jew is also one who descended from two full Jewish parents, if: (a) he belonged to the Jewish religious community at the time this law

cially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical, or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share.[6] Nor does the Act or its history ex-

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was issued, or who joined the community later; (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently; (c) he is the offspring from a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the protection of German blood and German honor became effective (RGBl. I, page 1146 of 15 Sept. 1935); (d) he is the offspring of an extramarital relationship, with a Jew, according to Section 1, and will be born out of wedlock after July 31, 1936."

[6] In 1968, almost 10 years before the Act was passed, the Small Business Administration had developed a program to assist small business concerns owned or controlled by "socially or economically disadvantaged persons." The agency's description of persons eligible for such assistance stated that such "persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos and Aleuts. . . ." See opinion of THE CHIEF JUSTICE, *ante*, at 463–464. This may be the source of the definition of the class at issue in this case. See also *ante*, at 487–488, n. 73. But the SBA's class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded all nonmembers of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged. The difference between the statutory quota involved in this case and the SBA's 1968 description of those whose businesses were to be assisted under § 8 (a) of the Small Business Act is thus at least as great as the difference between the University of California's racial quota and the Harvard ad-

plain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.[7]

Four different, though somewhat interrelated, justifications for the racial classification in this Act have been advanced: first, that the 10% set-aside is a form of reparation for past injuries to the entire membership of the class; second, that it is an appropriate remedy for past discrimination against minority business enterprises that have been denied access to public contracts; third, that the members of the favored class have a special entitlement to "a piece of the action" when government is distributing benefits; and, fourth, that the program is an appropriate method of fostering greater minority participation in a competitive economy. Each of these asserted justifications merits separate scrutiny.

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missions system that MR. JUSTICE POWELL regarded as critical in *University of California Regents* v. *Bakke*, 438 U. S. 265, 315–318.

[7] It was noted that the value of the federal contracts awarded to minority business firms in prior years had amounted to less than 1% of the total; since the statutory set-aside of 10% may be satisfied by subcontracts to minority business enterprises, it is possible that compliance with the statute would not change the 1% figure.

The legislative history also revealed that minority business enterprises represented about 3 or 4% of all eligible firms; the history does not indicate, however, whether the 10% figure was intended to provide the existing firms with three times as much business as they could expect to receive on a random basis or to encourage members of the class to acquire or form new firms. An Economic Development Administration guideline arguably implies that new investments made in order to take advantage of the 10% set-aside would not be considered "bona fide." See appendix to the opinion of THE CHIEF JUSTICE, *ante*, at 492.

The 10% figure bears no special relationship to the relative size of the entire racial class, to any of the six subclasses, or to the population of the subclasses in the areas where they primarily reside. The Aleuts and the Eskimos, for example, respectively represent less than 1% and 7% of the population of Alaska, see The New Columbia Encyclopedia 47, 59, 891 (4th ed. 1975), while Spanish-speaking or Negro citizens represent a majority or almost a majority in a large number of urban areas.

I

Racial characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations. Congress has recognized, for example, that the United States has treated some Indian tribes unjustly and has created procedures for allowing members of the injured classes to obtain classwide relief. See, *e. g., Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73. But as I have formerly suggested, if Congress is to authorize a recovery for a class of similarly situated victims of a past wrong, it has an obligation to distribute that recovery among the members of the injured class in an even-handed way. See *id.*, at 97–98 (STEVENS, J., dissenting). Moreover, in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure.

In his eloquent separate opinion in *University of California Regents* v. *Bakke*, 438 U. S. 265, 387, MR. JUSTICE MARSHALL recounted the tragic class-based discrimination against Negroes that is an indelible part of America's history. I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class. Whether our resources are adequate to support a fair remedy of that character is a policy question I have neither the authority nor the wisdom to address. But that serious classwide wrong cannot in itself justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.

Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our his-

tory, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although "the Negro was dragged to this country in chains to be sold in slavery," *Bakke, supra,* at 387 (opinion of MARSHALL, J.), the "Spanish-speaking" subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before the ancestors of most American citizens arrived. There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of the subclasses is equally entitled to reparations from the United States Government.[8]

At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong.[9] A ran-

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[8] Ironically, the Aleuts appear to have been ruthlessly exploited at some point in their history by Russian fur traders. See The New Columbia Encyclopedia, *supra,* at 59.

[9] For a similar reason, the discrimination against males condemned in *Califano* v. *Goldfarb,* 430 U. S. 199, could not be justified as a remedy for past discrimination against females. That case involved a statutory provision which relieved widows from the obligation of proving dependency on their deceased spouses in order to obtain benefits, but did not similarly relieve widowers.

"The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits. The widow most in need is the one who is 'suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.' [*Kahn* v. *Shevin,* 416 U. S. 351,] 354. To accept the *Kahn* justification we must presume that Congress deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn.*" *Id.,* at 221 (STEVENS, J., concurring in judgment).

dom distribution to a favored few is a poor form of compensation for an injury shared by many.

My principal objection to the reparation justification for this legislation, however, cuts more deeply than my concern about its inequitable character. We can never either erase or ignore the history that MR. JUSTICE MARSHALL has recounted. But if that history can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme, it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges. For if there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Although I do not dispute the validity of the assumption that each of the subclasses identified in the Act has suffered a severe wrong at some time in the past, I cannot accept this slapdash statute as a legitimate method of providing class-wide relief.

II

The Act may also be viewed as a much narrower remedial measure—one designed to grant relief to the specific minority business enterprises that have been denied access to public contracts by discriminatory practices.

The legislative history of the Act does not tell us when, or how often, any minority business enterprise was denied such access. Nevertheless, it is reasonable to infer that the number of such incidents has been relatively small in recent years. For, as noted by the Solicitor General, in the last 20 years Congress has enacted numerous statutes designed to eliminate discrimination and its effects from federally funded

programs.[10] Title VI of the Civil Rights Act of 1964 unequivocally and comprehensively prohibits discrimination on the basis of race in any program or activity receiving federal financial assistance. In view of the scarcity of litigated claims on behalf of minority business enterprises during this period, and the lack of any contrary evidence in the legislative record, it is appropriate to presume that the law has generally been obeyed.

Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; (2) firms that have never attempted to obtain any public business in the past; (3) firms that were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions; [11] (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders;

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[10] "The statute with the most comprehensive coverage is Title VI of the Civil Rights Act of 1964, 42 U. S. C. 2000d *et seq.*, which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Since the passage of Title VI, many other specific federal grant statutes have contained similar prohibitions against discrimination in particular funded activities. See, *e. g.*, State and Local Fiscal Assistance Amendments of 1976, 31 U. S. C. 1242; Energy Conservation and Production Act, 42 U. S. C. 6870; Housing and Community Development Act of 1974, 42 U. S. C. 5309; Comprehensive Employment and Training Act of 1973, 29 U. S. C. 991." Brief for Secretary of Commerce 21, n. 7.

[11] Although the plain language of the statute appears to include such firms, as I have already noted, n. 7, *supra*, the EDA guidelines may consider such newly formed firms ineligible for the statutory set-aside.

and (5) those firms that have been victimized by racial discrimination.

Since there is no reason to believe that any of the firms in the first four categories had been wrongfully excluded from the market for public contracts, the statutory preference for those firms cannot be justified as a remedial measure. And since a judicial remedy was already available for the firms in the fifth category,[12] it seems inappropriate to regard the preference as a remedy designed to redress any specific wrongs.[13] In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a "narrowly tailored" remedial measure.[14]

III

The legislative history of the Act discloses that there is a group of legislators in Congress identified as the "Black Caucus" and that members of that group argued that if the Federal Government was going to provide $4 billion of new

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[12] See *University of California Regents* v. *Bakke*, 438 U. S., at 418–421 (opinion of STEVENS, J.). See also § 207 (d) of the Public Works Employment Act of 1976, 90 Stat. 1008, 42 U. S. C. § 6727 (d).

[13] I recognize that the EDA has issued a Technical Bulletin, relied on heavily by THE CHIEF JUSTICE, *ante*, at 469–472, which distinguishes between higher bids quoted by minority subcontractors which are attributable to the effects of disadvantage or discrimination and those which are not. That is, according to the Bulletin, if it is determined that a subcontractor's uncompetitive high price is not attributable to the effects of discrimination, a contractor may be entitled to relief from the 10% set-aside requirement. But even assuming that the Technical Bulletin accurately reflects Congress' intent in enacting the set-aside, it is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination. Consequently, while THE CHIEF JUSTICE describes the set-aside as a remedial measure, it plainly operates as a flat quota.

[14] See THE CHIEF JUSTICE's opinion, *ante*, at 480.

public contract business, their constituents were entitled to "a piece of the action."

It is neither unusual nor reprehensible for Congressmen to promote the authorization of public construction in their districts. The flow of capital and employment into a district inevitably has both direct and indirect consequences that are beneficial. As MR. JUSTICE BRENNAN noted in *Elrod* v. *Burns*, 427 U. S. 347, however, the award of such contracts may become a form of political patronage that is dispensed by the party in power.[15] Although the practice of awarding such contracts to political allies may be as much a part of our history as the employment practices condemned in *Elrod*, it would surely be unconstitutional for the legislature to specify that all, or a certain portion, of the contracts authorized by a specific statute must be given to businesses controlled by members of one political party or another. That would be true even if the legislative majority was convinced that a grossly disproportionate share had been awarded to members of the opposite party in previous years.

In the short run our political processes might benefit from legislation that enhanced the ability of representatives of minority groups to disseminate patronage to their political backers. But in the long run any rule that authorized the award of public business on a racial basis would be just as objectionable as one that awarded such business on a purely partisan basis.

The legislators' interest in providing their constituents with favored access to benefits distributed by the Federal Government is, in my opinion, a plainly impermissible justification for this racial classification.

IV

The interest in facilitating and encouraging the participa-

[15] "Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies." 427 U. S., at 353.

tion by minority business enterprises in the economy is unquestionably legitimate. Any barrier to such entry and growth—whether grounded in the law or in irrational prejudice—should be vigorously and thoroughly removed. Equality of economic and investment opportunity is a goal of no less importance than equality of employment opportunity. This statute, however, is not designed to remove any barriers to entry. Nor does its sparse legislative history detail any insuperable or even significant obstacles to entry into the competitive market.

Three difficulties encountered by minority business enterprises in seeking governmental business on a competitive basis are identified in the legislative history. There were references to (1) unfamiliarity with bidding procedures followed by procurement officers, (2) difficulties in obtaining financing, and (3) past discrimination in the construction industry.

The first concern is no doubt a real problem for all businesses seeking access to the public contract market for the first time. It justifies a thorough review of bidding practices to make sure that they are intelligible and accessible to all. It by no means justifies an assumption that minority business enterprises are any less able to prepare and submit bids in proper form than are any other businessmen. Consequently, that concern does not justify a statutory classification on racial grounds.

The second concern would justify legislation prohibiting private discrimination in lending practices or authorizing special public financing for firms that have been or are unable to borrow money for reasons unrelated to their credit rating. It would not be an adequate justification for a requirement that a fixed percentage of all loans made by national banks be made to Eskimos or Orientals regardless of their ability to repay the loans. Nor, it seems to me, does it provide a sufficient justification for granting a preference to a broad class that includes, at one extreme, firms that have no credit

problem [16] and at the other extreme, firms whose unsatisfactory credit rating will prevent them from taking advantage of the statutory preference even though they are otherwise qualified to do the work. At best, the preference for minority business enterprises is a crude and inadequate response to the evils that flow from discriminatory lending practices.

The question whether the history of past discrimination has created barriers that can only be overcome by an unusual measure of this kind is more difficult to evaluate. In analyzing this question, I think it is essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete.

It is unfortunately but unquestionably true that irrational racial prejudice persists today and continues to obstruct minority participation in a variety of economic pursuits, presumably including the construction industry. But there are two reasons why this legislation will not eliminate, or even tend to eliminate, such prejudice. First, prejudice is less likely to be a significant factor in the public sector of the economy than in the private sector because both federal and

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[16] An example of such a firm was disclosed in the record of a recent case involving a claimed preference for a firm controlled by Indian shareholders:

"Based on the facts that were developed in the District Court, . . . the Indian community in general does not benefit from the [Bureau of Indian Affairs'] interpretation of [the Buy Indian Act].

"The facts that were developed in the District Court show that the beneficiaries of this interpretation were the owners of Indian Nations Construction Company. The president of that company is a one-fourth degree Indian who is an administrative law judge for the Department of Health, Education, and Welfare by occupation. The vice president of that company was a one-quarter blood Choctaw who is a self-employed rancher and who states his net worth at just under a half million dollars. The treasurer and general manager of that corporation is a non-Indian and he states his net worth at $1.3 million." Tr. of Oral Arg. in *Andrus* v. *Glover Construction Co.*, O. T. 1979, No. 79–48, pp. 26–27.

state laws have prohibited discrimination in the award of public contracts for many years. Second, and of greater importance, an absolute preference that is unrelated to a minority firm's ability to perform a contract inevitably will engender resentment on the part of competitors excluded from the market for a purely racial reason and skepticism on the part of customers and suppliers aware of the statutory classification. It thus seems clear to me that this Act cannot be defended as an appropriate method of reducing racial prejudice.

The argument that our history of discrimination has left the entire membership of each of the six racial classes identified in the Act less able to compete in a free market than others is more easily stated than proved. The reduction in prejudice that has occurred during the last generation has accomplished much less than was anticipated; it nevertheless remains true that increased opportunities have produced an ever-increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions. But, even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.[17] Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute.

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[17] See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 173–174 (BRENNAN, J., concurring in part): "[E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

This Act has a character that is fundamentally different from a carefully drafted remedial measure like the Voting Rights Act of 1965. A consideration of some of the dramatic differences between these two legislative responses to racial injustice reveals not merely a difference in legislative craftsmanship but a difference of constitutional significance. Whereas the enactment of the Voting Rights Act was preceded by exhaustive hearings and debates concerning discriminatory denial of access to the electoral process, and became effective in specific States only after specific findings were made, this statute authorizes an automatic nationwide preference for all members of a diverse racial class regardless of their possible interest in the particular geographic areas where the public contracts are to be performed. Just why a wealthy Negro or Spanish-speaking investor should have a preferred status in bidding on a construction contract in Alaska—or a citizen of Eskimo ancestry should have a preference in Miami or Detroit—is difficult to understand in light of either the asserted remedial character of the set-aside or the more basic purposes of the public works legislation.

The Voting Rights Act addressed the problem of denial of access to the electoral process. By outlawing specific practices, such as poll taxes and special tests, the statute removed old barriers to equal access; by requiring preclearance of changes in voting practices in covered States, it precluded the erection of new barriers. The Act before us today does not outlaw any existing barriers to access to the economic market and does nothing to prevent the erection of new barriers. On the contrary, it adopts the fundamentally different approach of creating a new set of barriers of its own.

A comparable approach in the electoral context would support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities. Surely that would be an effective way of ensuring black citizens the representation that has long been their due.

Quite obviously, however, such a measure would merely create the kind of inequality that an impartial sovereign cannot tolerate. Yet that is precisely the kind of "remedy" that this Act authorizes. In both political and economic contexts, we have a legitimate interest in seeing that those who were disadvantaged in the past may succeed in the future. But neither an election nor a market can be equally accessible to all if race provides a basis for placing a special value on votes or dollars.

The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race. The removal of barriers to access to political and economic processes serves that goal.[18] But the creation of new barriers can only frustrate true progress. For as MR. JUSTICE POWELL[19] and Mr. Justice Douglas[20] have perceptively observed, such protective barriers reinforce habitual ways of thinking in terms of classes instead of individuals. Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.[21] For this reason, I am firmly convinced

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[18] "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard,* 416 U. S. 312, 342 (Douglas, J., dissenting).

[19] See *University of California Regents* v. *Bakke,* 438 U. S., at 298.

[20] *DeFunis* v. *Odegaard, supra,* at 343 (dissenting opinion).

[21] In his *Bakke* opinion, *supra,* MR. JUSTICE POWELL stated:

"It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." 438 U. S., at 295.

In support of that proposition he quoted Professor Bickel's comment on the self-contradiction of that argument:

" 'The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' " *Id.,* at 295, n. 35.

that this "temporary measure" will disserve the goal of equal opportunity.

V

A judge's opinion that a statute reflects a profoundly unwise policy determination is an insufficient reason for concluding that it is unconstitutional. Congress has broad power to spend money to provide for the "general Welfare of the United States," to "regulate Commerce . . . among the several States," to enforce the Civil War Amendments, and to discriminate between aliens and citizens. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 101–102, n. 21.[22] But the exercise of these broad powers is subject to the constraints imposed by the Due Process Clause of the Fifth Amendment. That Clause has both substantive and procedural components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially.

Unlike MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, however, I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race. I am nonetheless persuaded that it does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes.[23]

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[22] This preferential set-aside specifically discriminates in favor of citizens of the United States. See *supra*, at 535.

[23] "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103.

"It is perfectly clear that neither the Congress nor the President has ever *required* the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service. On the other hand, in view of the fact that the policy has been in effect since the Commission was created in 1883, it is fair to infer that

For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process.[24]

In both its substantive and procedural aspects this Act is markedly different from the normal product of the legislative decisionmaking process. The very fact that Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics identifies a dramatic difference between this Act and the thousands of statutes that preceded it. This dramatic point of departure is not even mentioned in the statement of purpose of the Act or in the Reports of either the House or the Senate Committee that processed the legislation,[25] and was not the subject of any testimony or inquiry

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both the Legislature and the Executive have been aware of the policy and have acquiesced in it. In order to decide whether such acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission." *Id.*, at 105.

[24] See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 255 (1976):

"For the last few years have reawakened our appreciation of the primacy of process over product in a free society, the knowledge that no ends can be better than the means of their achievement. 'The highest morality is almost always the morality of process,' Professor Bickel wrote about Watergate a few months before his untimely death. If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws. This recognition now may well take our attention beyond the processes of adjudication and of executive government to a new concern with the due process of lawmaking." (Footnote omitted.)

[25] The only reference to any minority business enterprises in the Senate Report was a suggestion that Indians had been receiving *too great a share* of the public contracts. The Report stated:

"Some concern was expressed that Indians—with exceptionally high struc-

in any legislative hearing on the bill that was enacted. It is true that there was a brief discussion on the floor of the House as well as in the Senate on two different days, but only a handful of legislators spoke and there was virtually no debate. This kind of perfunctory consideration of an unprecedented policy decision of profound constitutional importance to the Nation is comparable to the accidental malfunction of the legislative process that led to what I regarded as a totally unjustified discrimination in *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S., at 97.

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.[26] Whenever

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tural unemployment levels—were awarded projects at a per capita value far in excess of non-Indian communities." S. Rep. No. 95–38, p. 3 (1977).

The Court quotes three paragraphs from a lengthy Report issued by the House Committee on Small Business in 1977, *ante*, at 465–466, implying that the contents of that Report were considered by Congress when it enacted the 10% minority set-aside. But that Report was not mentioned by anyone during the very brief discussion of the set-aside amendment. When one considers the vast quantity of written material turned out by the dozens of congressional committees and subcommittees these days, it is unrealistic to assume that a significant number of legislators read, or even were aware of, that Report. Even if they did, the Report does not contain an explanation of this 10% set-aside for six racial subclasses.

Indeed, the broad racial classification in this Act is totally unexplained. Although the legislative history discussed by THE CHIEF JUSTICE and by MR. JUSTICE POWELL explains why Negro citizens are included within the preferred class, there is absolutely no discussion of why Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts were also included. See n. 6, *supra*.

[26] "It is not a new thought that 'to guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process' is the central function of judicial review, as Dean Rostow and Profes-

Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decision-making process.[27] A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal."[28] Cf. THE CHIEF JUSTICE's opinion, *ante*, at 480; MR. JUSTICE MARSHALL's opinion concurring in the judgment, *ante*, at 521. If the general language of the Due Process Clause of the Fifth Amendment

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sor Strong, among others, have argued." Linde, *supra*, 55 Neb. L. Rev., at 251.

[27] See Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1188 (1977):

"[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress, like the decisions of subordinate governmental institutions, does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole."

[28] "Fear of legislative resentment at judicial interference is not borne out by experience where procedural review exists, any more than it was after the Supreme Court told Congress that it had used faulty procedure in unseating Representative Adam Clayton Powell. It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constitutents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted. Strikingly, the reverse view of propriety prevails in a number of nations where courts have never been empowered to set aside policies legitimately enacted into law but do have power to test the process of legitimate enactment." Linde, *supra*, 55 Neb. L. Rev., at 243 (footnotes omitted).

authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment—a clause that cannot be found in the Fifth Amendment—there can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.[29]

In all events, rather than take the substantive position expressed in MR. JUSTICE STEWART's dissenting opinion, I would hold this statute unconstitutional on a narrower ground. It cannot fairly be characterized as a "narrowly tailored" racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way.[30] The risk that habitual attitudes toward

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[29] The conclusion to THE CHIEF JUSTICE's opinion states:

"Any preference based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees." *Ante*, at 491 (emphasis added).

I agree with this statement but it seems to me that due process requires that the "most searching examination" be conducted in the first instance by Congress rather than by a federal court.

[30] For example, why were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate? Are businesses formed just to take advantage of the preference eligible?

classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

When Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment.[31] When the classification is defined in racial terms, I believe that such particular identification is imperative.

In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we

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[31] "Of course, a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character." *Califano* v. *Jobst,* 434 U. S. 47, 53.

"If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court." *Foley* v. *Connelie,* 435 U. S. 291, 312 (STEVENS, J., dissenting).

may notice judicially provides any support for such a proposition. It is up to Congress to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class. In my opinion, because it has failed to make that demonstration, it has also failed to discharge its duty to govern impartially embodied in the Fifth Amendment to the United States Constitution.

I respectfully dissent.

Syllabus

RICHMOND NEWSPAPERS, INC., ET AL. *v.* VIRGINIA ET AL.

APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 79-243. Argued February 19, 1980—Decided July 2, 1980

At the commencement of a fourth trial on a murder charge (the defendant's conviction after the first trial having been reversed on appeal, and two subsequent retrials having ended in mistrials), the Virginia trial court granted defense counsel's motion that the trial be closed to the public without any objections having been made by the prosecutor or by appellants, a newspaper and two of its reporters who were present in the courtroom, defense counsel having stated that he did not "want any information being shuffled back and forth when we have a recess as to . . . who testified to what." Later that same day, however, the trial judge granted appellants' request for a hearing on a motion to vacate the closure order, and appellants' counsel contended that constitutional considerations mandated that before ordering closure the court should first decide that the defendant's rights could be protected in no other way. But the trial judge denied the motion, saying that if he felt that the defendant's rights were infringed in any way and others' rights were not overridden he was inclined to order closure, and ordered the trial to continue "with the press and public excluded." The next day, the court granted defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. Thereafter, the court granted appellants' motion to intervene *nunc pro tunc* in the case, and the Virginia Supreme Court dismissed their mandamus and prohibition petitions and, finding no reversible error, denied their petition for appeal from the closure order.

Held: The judgment is reversed. Pp. 563–581; 584–598; 598–601; 601–604.

Reversed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE STEVENS, concluded that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. *Gannett Co.* v. *DePasquale*, 443 U. S. 368, distinguished. Pp. 563–581.

(a) The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14, which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice. Cf., *e. g.*, *Levine* v. *United States*, 362 U. S. 610. Pp. 563–575.

(b) The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. Pp. 575–578.

(c) Even though the Constitution contains no provision which by its terms guarantees to the public the right to attend criminal trials, various fundamental rights, not expressly guaranteed, have been recognized as indispensable to the enjoyment of enumerated rights. The right to attend criminal trials is implicit in the guarantees of the First Amend-

ment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. Pp. 579–580.

(d) With respect to the closure order in this case, despite the fact that this was the accused's fourth trial, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial; and there was no suggestion that any problems with witnesses could not have been dealt with by exclusion from the courtroom or sequestration during the trial, or that sequestration of the jurors would not have guarded against their being subjected to any improper information. Pp. 580–581.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures the public a right of access to trial proceedings, and that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public. Historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury, and trial access assumes structural importance in this Nation's government of laws by assuring the public that procedural rights are respected and that justice is afforded equally, by serving as an effective restraint on possible abuse of judicial power, and by aiding the accuracy of the trial factfinding process. It was further concluded that it was not necessary to consider in this case what countervailing interests might be sufficiently compelling to reverse the presumption of openness of trials, since the Virginia statute involved—authorizing trial closures at the unfettered discretion of the judge and parties—violated the First and Fourteenth Amendments. Pp. 584–598.

MR. JUSTICE STEWART concluded that the First and Fourteenth Amendments clearly give the press and the public a right of access to trials, civil as well as criminal; that such right is not absolute, since various considerations may sometimes justify limitations upon the unrestricted presence of spectators in the courtroom; but that in the present case the trial judge apparently gave no recognition to the right of representatives of the press and members of the public to be present at the trial. Pp. 598–601.

MR. JUSTICE BLACKMUN, while being of the view that *Gannett Co.* v. *DePasquale, supra,* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing

involved there, and that the right to a public trial is to be found in the Sixth Amendment, concluded, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial, and that here, by closing the trial, the trial judge abridged these First Amendment interests of the public. Pp. 601–604.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which WHITE and STEVENS, JJ., joined. WHITE, J., *post*, p. 581, and STEVENS, J., *post*, p. 582, filed concurring opinions. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 584. STEWART, J., *post*, p. 598, and BLACKMUN, J., *post*, p. 601, filed opinions concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, *post*, p. 604. POWELL, J., took no part in the consideration or decision of the case.

Laurence H. Tribe argued the cause for appellants. With him on the briefs were *Andrew J. Brent, Alexander Wellford, Leslie W. Mullins,* and *David Rosenberg.*

Marshall Coleman, Attorney General of Virginia, argued the cause for appellees. With him on the brief were *James E. Moore, Leonard L. Hopkins, Jr., Martin A. Donlan, Jr.,* and *Jerry P. Slonaker,* Assistant Attorneys General.*

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE STEVENS joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

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*Briefs of *amici curiae* urging reversal were filed by *John J. Degnan,* Attorney General, and *John De Cicco, Anthony J. Parrillo,* and *Debra L. Stone,* Deputy Attorneys General, for the State of New Jersey; by *Stephen Bricker* and *Bruce J. Ennis* for the American Civil Liberties Union et al.; by *Arthur B. Hanson, Frank M. Northam, Mitchell W. Dale,* and *Richard M. Schmidt, Jr.,* for the American Newspaper Publishers Association et al.; by *E. Barrett Prettyman, Jr., Erwin G. Krasnow, Arthur B. Sackler,* and *J. Laurent Scharff* for The Reporters Committee for Freedom of the Press et al.; and by *Edward Bennett Williams, John B. Kuhns,* and *Kevin T. Baine* for The Washington Post et al.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S. E. 2d 779.

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978, when a juror asked to be excused after trial had begun and no alternate was available.[1]

A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. See App. 35a–36a.

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public:

> "[T]here was this woman that was with the family of the deceased when we were here before. She had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have

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[1] A newspaper account published the next day reported the mistrial and went on to note that "[a] key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing. The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly." App. 34a.

a recess as to what—who testified to what." Tr. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public 2–3.

The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection and would leave it to the discretion of the court. *Id.*, at 4. Presumably referring to Va. Code § 19.2–266 (Supp. 1980), the trial judge then announced: "[T]he statute gives me that power specifically and the defendant has made the motion." He then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." Tr., *supra*, at 4–5.[2] The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day's proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial; accordingly, he again ordered the reporters to leave the courtroom, and they complied.

At the closed hearing, counsel for appellants observed that no evidentiary findings had been made by the court prior to the entry of its closure order and pointed out that the court had failed to consider any other, less drastic measures within its power to ensure a fair trial. Tr. of Sept. 11, 1978 Hearing on Motion to Vacate 11–12. Counsel for appellants argued that constitutional considerations mandated that before ordering closure, the court should first decide that the rights of the defendant could be protected in no other way.

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[2] Virginia Code § 19.2–266 (Supp. 1980) provides in part:

"In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

Counsel for defendant Stevenson pointed out that this was the fourth time he was standing trial. He also referred to "difficulty with information between the jurors," and stated that he "didn't want information to leak out," be published by the media, perhaps inaccurately, and then be seen by the jurors. Defense counsel argued that these things, plus the fact that "this is a small community," made this a proper case for closure. *Id.*, at 16–18.

The trial judge noted that counsel for the defendant had made similar statements at the morning hearing. The court also stated:

> "[O]ne of the other points that we take into consideration in this particular Courtroom is layout of the Courtroom. I think that having people in the Courtroom is distracting to the jury. Now, we have to have certain people in here and maybe that's not a very good reason. When we get into our new Court Building, people can sit in the audience so the jury can't see them. The rule of the Court may be different under those circumstances. . . ." *Id.*, at 19.

The prosecutor again declined comment, and the court summed up by saying:

> "I'm inclined to agree with [defense counsel] that, if I feel that the rights of the defendant are infringed in any way, [when] he makes the motion to do something and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion." *Id.*, at 20.

The court denied the motion to vacate and ordered the trial to continue the following morning "with the press and public excluded." *Id.*, at 27; App. 21a.

What transpired when the closed trial resumed the next day was disclosed in the following manner by an order of the court entered September 12, 1978:

> "[I]n the absence of the jury, the defendant by counsel

made a Motion that a mis-trial be declared, which motion was taken under advisement.

"At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which Motion was sustained by the Court.

"And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart." *Id.*, at 22a.[3]

On September 27, 1978, the trial court granted appellants' motion to intervene *nunc pro tunc* in the Stevenson case. Appellants then petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the trial court's closure order. On July 9, 1979, the Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal. *Id.*, at 23a–28a.

Appellants then sought review in this Court, invoking both our appellate, 28 U. S. C. § 1257 (2), and certiorari jurisdiction. § 1257 (3). We postponed further consideration of the question of our jurisdiction to the hearing of the case on the merits. 444 U. S. 896 (1979). We conclude that jurisdiction by appeal does not lie;[4] however, treating the filed

[3] At oral argument, it was represented to the Court that tapes of the trial were available to the public as soon as the trial terminated. Tr. of Oral Arg. 36.

[4] In our view, the validity of Va. Code § 19.2–266 (Supp. 1980) was not sufficiently drawn in question by appellants before the Virginia courts to invoke our appellate jurisdiction. "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185 (1945). Appellants never explicitly challenged the statute's validity. In both the trial court and the State Supreme Court, appellants argued that constitutional rights of the public and the press prevented the court from closing a trial without first

papers as a petition for a writ of certiorari pursuant to 28 U. S. C. § 2103, we grant the petition.

The criminal trial which appellants sought to attend has long since ended, and there is thus some suggestion that the case is moot. This Court has frequently recognized, however, that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. See, *e. g.*, *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378 (1979); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547 (1976). If the underlying dispute is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), it is not moot.

Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order "will evade review, or at least considered plenary review in this Court." *Nebraska Press*, *supra*, at 547. Accordingly, we turn to the merits.

II

We begin consideration of this case by noting that the precise issue presented here has not previously been before this

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giving notice and an opportunity for a hearing to the public and the press and exhausting every alternative means of protecting the defendant's right to a fair trial. Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court. Cf. *Phillips* v. *United States*, 312 U. S. 246, 252 (1941) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . ."). Such claims are properly brought before this Court by way of our certiorari, rather than appellate, jurisdiction. See, *e. g.*, *Kulko* v. *California Superior Court*, 436 U. S. 84, 90, n. 4 (1978); *Hanson* v. *Denckla*, 357 U. S. 235, 244, and n. 4 (1958). We shall, however, continue to refer to the parties as appellants and appellee. See *Kulko*, *supra*.

Court for decision. In *Gannett Co.* v. *DePasquale, supra,* the Court was not required to decide whether a right of access to *trials,* as distinguished from hearings on *pre*trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a *trial*. . . ." 443 U. S., at 394 (BURGER, C. J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, *id.,* at 392, and n. 24; nor did the dissenting opinion reach this issue. *Id.,* at 447 (opinion of BLACKMUN, J.).

In prior cases the Court has treated questions involving conflicts between publicity and a defendant's right to a fair trial; as we observed in *Nebraska Press Assn.* v. *Stuart, supra,* at 547, "[t]he problems presented by this [conflict] are almost as old as the Republic." See also, *e. g., Gannett, supra; Murphy* v. *Florida,* 421 U. S. 794 (1975); *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966); *Estes* v. *Texas,* 381 U. S. 532 (1965). But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

A

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe.

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Pollock, English Law Before the Norman Conquest, in 1 Select Essays in Anglo-American Legal History 88, 89 (1907). Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment. *Id.*, at 89–90; see also 1 W. Holdsworth, A History of English Law 10, 12 (1927).[5]

With the gradual evolution of the jury system in the years after the Norman Conquest, see, *e. g.*, *id.*, at 316, the duty of all freemen to attend trials to render judgment was relaxed, but there is no indication that criminal trials did not remain public. When certain groups were excused from compelled attendance, see the Statute of Marlborough, 52 Hen. 3, ch. 10 (1267); 1 Holdsworth, *supra*, at 79, and n. 4, the statutory exemption did not prevent them from attending; Lord Coke observed that those excused "are not compellable to come, but left to their own liberty." 2 E. Coke, Institutes of the Laws of England 121 (6th ed. 1681).[6]

Although there appear to be few contemporary statements

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[5] That there is little in the way of a contemporary record from this period is not surprising. It has been noted by historians, see E. Jenks, A Short History of English Law 3–4 (2d ed. 1922), that the early Anglo-Saxon laws "deal rather with the novel and uncertain, than with the normal and undoubted rules of law. . . . Why trouble to record that which every village elder knows? Only when a disputed point has long caused bloodshed and disturbance, or when a successful invader . . . insists on a change, is it necessary to draw up a code." *Ibid.*

[6] Coke interpreted certain language of an earlier chapter of the same statute as specifically indicating that court proceedings were to be public in nature: "These words [*In curia Domini Regis*] are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts *openly* in the King's Courts, *whither all persons may resort. . . .*" 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681) (emphasis added).

on the subject, reports of the Eyre of Kent, a general court held in 1313–1314, evince a recognition of the importance of public attendance apart from the "jury duty" aspect. It was explained that

> "the King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this,* he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare." 1 Holdsworth, *supra,* at 268, quoting from the S. S. edition of the Eyre of Kent, vol. i., p. 2 (emphasis added).

From these early times, although great changes in courts and procedure took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided. Sir Thomas Smith, writing in 1565 about "the definitive proceedinges in causes criminall," explained that, while the indictment was put in writing as in civil law countries:

> "All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it,* and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*" T. Smith, De Republica Anglorum 101 (Alston ed. 1972) (emphasis added).

Three centuries later, Sir Frederick Pollock was able to state of the "rule of publicity" that, "[h]ere we have one tradition, at any rate, which has persisted through all changes." F. Pollock, The Expansion of the Common Law 31–32 (1904). See also E. Jenks, The Book of English Law 73–74 (6th ed. 1967): "[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the

public have free access, . . . appears to have been the rule in England from time immemorial."

We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," *Daubney* v. *Cooper*, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K. B. 1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that they were open, and nothing to the contrary has been cited. See A. Scott, Criminal Law in Colonial Virginia 128–129 (1930); Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 367, 405 (1907). Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them. See Scott, *supra*, at 132.

In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." Reprinted in Sources of Our Liberties 188 (R. Perry ed. 1959).

See also 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

The Pennsylvania Frame of Government of 1682 also provided "[t]hat all courts shall be open . . . ," Sources of Our Liberties, *supra*, at 217; 1 Schwartz, *supra*, at 140, and this declaration was reaffirmed in § 26 of the Constitution adopted by Pennsylvania in 1776. See 1 Schwartz, *supra*, at 271. See also §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, *supra*, at 73, 80.

Other contemporary writings confirm the recognition that part of the very nature of a criminal trial was its openness to those who wished to attend. Perhaps the best indication of this is found in an address to the inhabitants of Quebec which was drafted by a committee consisting of Thomas Cushing, Richard Henry Lee, and John Dickinson and approved by the First Continental Congress on October 26, 1774. 1 Journals of the Continental Congress, 1774–1789, pp. 101, 105 (1904) (Journals). This address, written to explain the position of the Colonies and to gain the support of the people of Quebec, is an "exposition of the fundamental rights of the colonists, as they were understood by a representative assembly chosen from all the colonies." 1 Schwartz, *supra*, at 221. Because it was intended for the inhabitants of Quebec, who had been "educated under another form of government" and had only recently become English subjects, it was thought desirable for the Continental Congress to explain "the inestimable advantages of a free English constitution of government, which it is the privilege of all English subjects to enjoy." 1 Journals 106.

> "[One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, *in open Court, before as many of the people as chuse to*

> *attend,* shall pass their sentence upon oath against him. . . ." *Id.*, at 107 (emphasis added).

B

As we have shown, and as was shown in both the Court's opinion and the dissent in *Gannett*, 443 U. S., at 384, 386, n. 15, 418–425, the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. See, *e. g.*, M. Hale, The History of the Common Law of England 343–345 (6th ed. 1820); 3 W. Blackstone, Commentaries *372–*373. Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, Rationale of Judicial Evidence 524 (1827).[7]

Panegyrics on the values of openness were by no means confined to self-praise by the English. Foreign observers of English criminal procedure in the 18th and early 19th cen-

[7] Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Rationale of Judicial Evidence, at 522–525.

turies came away impressed by the very fact that they had been freely admitted to the courts, as many were not in their own homelands. See L. Radzinowicz, A History of English Criminal Law 715, and n. 96 (1948). They marveled that "the whole juridical procedure passes in public," 2 P. Grosley, A Tour to London; or New Observations on England 142 (Nugent trans. 1772), quoted in Radzinowicz, *supra*, at 717, and one commentator declared:

> "The main excellence of the English judicature consists in publicity, in the free trial by jury, and in the extraordinary despatch with which business is transacted. The publicity of their proceedings is indeed astonishing. *Free access to the courts is universally granted.*" C. Goede, A Foreigner's Opinion of England 214 (Horne trans. 1822). (Emphasis added.)

The nexus between openness, fairness, and the perception of fairness was not lost on them:

> "[T]he judge, the counsel, and the jury, are constantly exposed to public animadversion; and this greatly tends to augment the extraordinary confidence, which the English repose in the administration of justice." *Id.*, at 215.

This observation raises the important point that "[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony." 6 J. Wigmore, Evidence § 1834, p. 435 (J. Chadbourn rev. 1976).[8] The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame

[8] A collateral aspect seen by Wigmore was the possibility that someone in attendance at the trial or who learns of the proceedings through publicity may be able to furnish evidence in chief or contradict "falsifiers." 6 Wigmore, at 436. Wigmore gives examples of such occurrences. *Id.*, at 436, and n. 2.

the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. See H. Weihofen, The Urge to Punish 130–131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'" Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." *Supra*, at 567. It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal

process "satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

Looking back, we see that when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was in fact being done.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." 6 Wigmore, *supra*, at 438. See also 1 J. Bentham, Rationale of Judicial Evidence, at 525.

In earlier times, both in England and America, attendance at court was a common mode of "passing the time." See, *e. g.*, 6 Wigmore, *supra*, at 436; Mueller, *supra*, at 6. With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet "[i]t is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *State* v. *Schmit*, 273 Minn. 78, 87–88, 139 N. W. 2d 800, 807 (1966). Instead of acquiring information about trials by firsthand observation or by word

of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ." *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 587 (BRENNAN, J., concurring in judgment).

C

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years.[9] Even while holding, in *Levine* v.

[9] "Of course trials must be public and the public have a deep interest in trials." *Pennekamp* v. *Florida*, 328 U. S. 331, 361 (1946) (Frankfurter, J, concurring).

"A trial is a public event. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947) (Douglas, J.).

"[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. . . .

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial." *In re Oliver*, 333 U. S. 257, 266 (1948) (Black, J.) (footnotes omitted).

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens

United States, 362 U. S. 610 (1960), that a criminal contempt proceeding was not a "criminal prosecution" within the meaning of the Sixth Amendment, the Court was careful to note that more than the Sixth Amendment was involved:

> "[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' . . . [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions. . . ." *Id.*, at 616.[10]

And recently in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), both the majority, *id.*, at 384, 386, n. 15, and dissenting opinion, *id.*, at 423, agreed that open trials were part of the common-law tradition.

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there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari).

"It is true that the public has the right to be informed as to what occurs in its courts, . . . reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court. . . ." *Estes* v. *Texas*, 381 U. S. 532, 541–542 (1965) (Clark, J.); see also *id.*, at 583–584 (Warren, C. J., concurring). (The Court ruled, however, that the televising of the criminal trial over the defendant's objections violated his due process right to a fair trial.)

"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard* v. *Maxwell*, 384 U. S. 333, 349 (1966) (Clark, J.).

[10] The Court went on to hold that, "on the particular circumstances of the case," 362 U. S., at 616, the accused could not complain on appeal of the "so-called 'secrecy' of the proceedings," *id.*, at 617, because, with counsel present, he had failed to object or to request the judge to open the courtroom at the time.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

III

A

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court. *Supra*, at 564–575, and n. 9.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." 1 Journals 106, 107. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-

expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'" *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 263 (1941) (footnote omitted).

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," cf. *Gannett*, *supra*, at 397 (POWELL, J., concurring); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Pell* v. *Procunier*, 417 U. S. 817 (1974),[11] or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U. S. 665, 681 (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a

[11] *Procunier* and *Saxbe* are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not "open" or public places. Penal institutions do not share the long tradition of openness, although traditionally there have been visiting committees of citizens, and there is no doubt that legislative committees could exercise plenary oversight and "visitation rights." *Saxbe*, 417 U. S., at 849, noted that "limitation on visitations is justified by what the Court of Appeals acknowledged as 'the truism that prisons are institutions where public access is generally limited.' 161 U. S. App. D. C., at 80, 494 F. 2d, at 999. See *Adderley* v. *Florida*, 385 U. S. 39, 41 (1966) [jails]." See also *Greer* v. *Spock*, 424 U. S. 828 (1976) (military bases).

trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.[12]

B

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen.[13]

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[12] That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media whose representatives "are entitled to the same rights [to attend trials] as the general public." *Estes* v. *Texas*, 381 U. S., at 540.

[13] When the First Congress was debating the Bill of Rights, it was contended that there was no need separately to assert the right of assembly because it was subsumed in freedom of speech. Mr. Sedgwick of Massachusetts argued that inclusion of "assembly" among the enumerated rights would tend to make the Congress "appear trifling in the eyes of their constituents. . . . If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question. . . ." 1 Annals of Cong. 731 (1789).

Since the right existed independent of any written guarantee, Sedgwick went on to argue that if it were the drafting committee's purpose to protect all inherent rights of the people by listing them, "they might have gone into a very lengthy enumeration of rights," but this was unnecessary, he said, "in a Government where none of them were intended to be infringed." *Id.*, at 732.

Mr. Page of Virginia responded, however, that at times "such rights have been opposed," and that "people have . . . been prevented from assembling together on their lawful occasions":

"[T]herefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," *Hague* v. *CIO*, 307 U. S. 496, 519 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, *e. g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); see also *Cox* v. *Louisiana*, 379 U. S. 559, 560–564 (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see *Hague* v. *CIO*, *supra*, at 515 (opinion of Roberts, J.); a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.[14]

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be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." *Ibid.* The motion to strike "assembly" was defeated. *Id.*, at 733.

[14] It is of course true that the right of assembly in our Bill of Rights was in large part drafted in reaction to restrictions on such rights in England. See, *e. g.*, 1 Geo. 1, stat. 2, ch. 5 (1714); cf. 36 Geo. 3, ch. 8 (1795). As we have shown, the right of Englishmen to attend trials was not similarly limited; but it would be ironic indeed if the very historic openness of the trial could militate against protection of the right to attend it. The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights. The very purpose of the First Amendment is to guarantee all facets of each right described; its draftsmen sought both to protect the "rights of Englishmen" and to enlarge their scope. See *Bridges* v. *California*, 314 U. S. 252, 263–265 (1941).

"There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Id.*, at 265.

C

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. See, *e. g.*, The Federalist No. 84 (A. Hamilton). In a letter to Thomas Jefferson in October 1788, James Madison explained why he, although "in favor of a bill of rights," had "not viewed it in an important light" up to that time: "I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted." He went on to state that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." 5 Writings of James Madison 271 (G. Hunt ed. 1904).[15]

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a rea-

[15] Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. See 1 Annals of Cong. 438–440 (1789). See also, *e. g.*, 2 J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891). Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

sonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.[16] The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials [17] is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408 U. S., at 681.

D

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* made clear that although the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. 443 U. S., at 382. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alterna-

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[16] See, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449 (1958) (right of association); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Stanley* v. *Georgia*, 394 U. S. 557 (1969) (right to privacy); *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976), and *Taylor* v. *Kentucky*, 436 U. S. 478, 483–486 (1978) (presumption of innocence); *In re Winship*, 397 U. S. 358 (1970) (standard of proof beyond a reasonable doubt); *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966), and *Shapiro* v. *Thompson*, 394 U. S. 618, 630 (1969) (right to interstate travel).

[17] Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

tive solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett*, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. See, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 563–565; *Sheppard* v. *Maxwell*, 384 U. S., at 357–362. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. See *id.*, at 359. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.[18] Accordingly, the judgment under review is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

This case would have been unnecessary had *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), construed the Sixth

[18] We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., *e. g.*, 6 J. Wigmore, Evidence § 1835 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e. g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is

Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of THE CHIEF JUSTICE.

MR. JUSTICE STEVENS, concurring.

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.

Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850, MR. JUSTICE POWELL unequivocally rejected the conclusion that "*any* governmental restriction on press access to information,

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exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*, at 574. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. Compare, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), with *Illinois* v. *Allen*, 397 U. S. 337 (1970), and *Estes* v. *Texas*, 381 U. S. 532 (1965). Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives. Cf. *Gannett*, 443 U. S., at 397–398 (POWELL, J., concurring); *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 17 (1978) (STEWART, J., concurring in judgment); *id.*, at 32 (STEVENS, J., dissenting).

so long as it is nondiscriminatory, falls outside the purview of First Amendment concern." *Id.*, at 857 (emphasis in original). And in *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 19–40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL, and I were convinced that "[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." *Id.*, at 38. Since MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion expressed in the prevailing opinions.[1] Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a long-standing policy of concealment, and an absence of any legitimate justification for abridging public access to information about how government operates. In this case we are protecting the interests of the most powerful voices in the community, we are concerned with an almost unique exception to an established tradition of openness in the conduct of crim-

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[1] "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." 438 U. S., at 15 (opinion of BURGER, C. J.).

"The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government. . . . The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Id.*, at 16 (STEWART, J., concurring in judgment).

inal trials, and it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial.[2]

In any event, for the reasons stated in Part II of my *Houchins* opinion, 438 U. S., at 30–38, as well as those stated by THE CHIEF JUSTICE today, I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Gannett Co. v. *DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through

[2] Neither that likely motivation nor facts showing the risk that a fifth trial would have been necessary without closure of the fourth are disclosed in this record, however. The absence of any articulated reason for the closure order is a sufficient basis for distinguishing this case from *Gannett Co.* v. *DePasquale*, 443 U. S. 368. The decision today is in no way inconsistent with the perfectly unambiguous holding in *Gannett* that the rights guaranteed by the Sixth Amendment are rights that may be asserted by the accused rather than members of the general public. In my opinion the Framers quite properly identified the party who has the greatest interest in the right to a public trial. The language of the Sixth Amendment is worth emphasizing:

"In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (Emphasis added.)

the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

I

While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, see, *e. g., Brown* v. *Glines,* 444 U. S. 348, 364 (1980) (BRENNAN, J., dissenting); *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 558–559 (1976); *id.,* at 590 (BRENNAN, J., concurring in judgment); *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971) (*per curiam* opinion); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 715–716 (1931), the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information, see, *e. g., Saxbe* v. *Washington Post Co.,* 417 U. S. 843, 849

[1] Of course, the Sixth Amendment remains the source of the *accused's* own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale,* 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States,* 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver,* 333 U. S. 257 (1948) (Fourteenth Amendment due process). Analogously, racial segregation has been found independently offensive to the Equal Protection and Fifth Amendment Due Process Clauses. Compare *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954), with *Bolling* v. *Sharpe,* 347 U. S. 497, 499–500 (1954).

(1974); *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965); see also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 8–9 (1978) (opinion of BURGER, C. J.); *id.*, at 16 (STEWART, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, 433 U. S., at 404–405 (REHNQUIST, J., concurring). But cf. *id.*, at 397–398 (POWELL, J., concurring); *Houchins*, *supra*, at 27–38 (STEVENS, J., dissenting); *Saxbe*, *supra*, at 856–864 (POWELL, J., dissenting); *Pell* v. *Procunier*, 417 U. S. 817, 839–842 (1974) (Douglas, J., dissenting).[2] Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. See *Houchins*, *supra*, at 8–9 (opinion of BURGER, C. J.) (access to prisons); *Saxbe*, *supra*, at 849 (same); *Pell*, *supra*, at 831–832 (same); *Estes* v. *Texas*, 381 U. S. 532, 541–542 (1965) (television in courtroom); *Zemel* v. *Rusk*, *supra*, at 16–17 (validation of passport to unfriendly country). These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.

The Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker

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[2] A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public. See, *e. g.*, *Saxbe* v. *Washington Post Co.*, 417 U. S., at 850; *Pell* v. *Procunier*, 417 U. S., at 834–835. But no such contention is at stake here. Since the media's right of access is at least equal to that of the general public, see *ibid.*, this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials. As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.

and listener. When so employed against prior restraints, free speech protections are almost insurmountable. See *Nebraska Press Assn.* v. *Stuart*, *supra*, at 558–559; *New York Times Co.* v. *United States*, *supra*, at 714 (*per curiam* opinion). See generally Brennan, Address, 32 Rutgers L. Rev. 173, 176 (1979). But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249–250 (1936); *Stromberg* v. *California*, 283 U. S. 359, 369 (1931); Brennan, *supra*, at 176–177; J. Ely, Democracy and Distrust 93–94 (1980); T. Emerson, The System of Freedom of Expression 7 (1970); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 23 (1971). Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.[3] The structural

[3] This idea has been foreshadowed in MR. JUSTICE POWELL's dissent in *Saxbe* v. *Washington Post Co.*, *supra*, at 862–863:

"What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . '[The] First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.' . . . It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." (Footnote omitted.)

model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.[4]

However, because "the stretch of this protection is theoretically endless," Brennan, *supra*, at 177, it must be invoked with discrimination and temperance. For so far as the participating citizen's need for information is concerned, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." *Zemel* v. *Rusk*, *supra*, at 16–17. An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded.[5]

This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning. But at least

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[4] The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel. The right of suffrage has been inferred from the nature of "a free and democratic society" and from its importance as a "preservative of other basic civil and political rights. . . ." *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 34, n. 74 (1973). So, too, the explicit freedoms of speech, petition, and assembly have yielded a correlative guarantee of certain associational activities. *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). See also *Rodriguez*, *supra*, at 33–34 (indicating that rights may be implicitly embedded in the Constitution); 411 U. S., at 62–63 (BRENNAN, J., dissenting); *id.*, at 112–115 (MARSHALL, J., dissenting); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring).

[5] Analogously, we have been somewhat cautious in applying First Amendment protections to communication by way of nonverbal and nonpictorial conduct. Some behavior is so intimately connected with expression that for practical purposes it partakes of the same transcendental constitutional value as pure speech. See, *e. g.*, *Tinker* v. *Des Moines School District*, 393 U. S. 503, 505–506 (1969). Yet where the connection between expression and action is perceived as more tenuous, communicative interests may be overridden by competing social values. See, *e. g.*, *Hughes* v. *Superior Court*, 339 U. S. 460, 464–465 (1950).

two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Cf. *In re Winship*, 397 U. S. 358, 361–362 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.

II

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." *In re Oliver*, 333 U. S. 257, 266 (1948); see *Gannett Co.* v. *DePasquale*, 443 U. S., at 419–420 (BLACKMUN, J., concurring and dissenting). Indeed, historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury. *In re Oliver, supra*, at 266; Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932).[6] Pre-eminent English legal observers and commentators have unreservedly acknowledged and applauded the public character of the common-law

[6] "[The public trial] seems almost a necessary incident of jury trials, since the presence of a jury . . . already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the 'country' and that it was in that capacity and not as judges, that it was summoned." Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932); see 3 W. Blackstone, Commentaries *349 ("trial *by jury*; called also the trial *per pais*, or *by the country*"); T. Smith, De Republica Anglorum 79 (1970).

trial process. See T. Smith, De Republica Anglorum 77, 81–82 (1970);[7] 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681); 3 W. Blackstone, Commentaries *372–*373;[8] M. Hale, The History of the Common Law of England 342–344 (6th ed. 1820);[9] 1 J. Bentham, Rationale of Judicial Evidence 584–585 (1827). And it appears that "there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history." *Gannett, supra,* at 420 (BLACKMUN, J., concurring and dissenting); see also *In re Oliver, supra,* at 269, n. 22; Radin, *supra,* at 386–387.

This legacy of open justice was inherited by the English settlers in America. The earliest charters of colonial government expressly perpetuated the accepted practice of public trials. See Concessions and Agreements of West New Jersey, 1677, ch. XXIII;[10] Pennsylvania Frame of Government, 1682, Laws Agreed Upon in England, V.[11] "There is no evidence that any colonial court conducted criminal trials behind closed doors. . . ." *Gannett Co.* v. *DePasquale, supra,* at 425 (BLACKMUN, J., concurring and dissenting). Subsequently framed state constitutions also prescribed open trial proceedings. See, *e. g.,* Pennsylvania Declaration of Rights, 1776, IX;[12] North Carolina Declaration of Rights, 1776, IX;[13] Vermont Declaration of Rights, X (1777);[14] see also *In re Oliver,* 333 U. S., at 267. "Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, . . . most of the original states and those subsequently admitted to

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[7] First published in 1583.

[8] First published in 1765.

[9] First edition published in 1713.

[10] Quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

[11] *Id.,* at 140.

[12] *Id.,* at 265.

[13] *Id.,* at 287.

[14] *Id.,* at 323.

the Union adopted similar constitutional provisions." *Ibid.*[15] Today, the overwhelming majority of States secure the right to public trials. *Gannett, supra,* at 414–415, n. 3 (BLACKMUN, J., concurring and dissenting); see also *In re Oliver, supra,* at 267–268, 271, and nn. 17–20.

This Court too has persistently defended the public character of the trial process. *In re Oliver* established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. Noting the "universal rule against secret trials," 333 U. S., at 266, the Court held that

> "[i]n view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison." *Id.,* at 273.[16]

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[15] To be sure, some of these constitutions, such as the Pennsylvania Declaration of Rights, couched their public trial guarantees in the language of the accused's rights. But although the Court has read the Federal Constitution's explicit public trial provision, U. S. Const., Amdt. 6, as benefiting the defendant alone, it does not follow that comparably worded state guarantees must be so construed. See *Gannett Co.* v. *DePasquale,* 443 U. S., at 425, and n. 9 (BLACKMUN, J., concurring and dissenting); cf. also *Mallott* v. *State,* 608 P. 2d 737, 745, n. 12 (Alaska 1980). And even if the specific state public trial protections must be invoked by defendants, those state constitutional clauses still provide evidence of the importance attached to open trials by the founders of our state governments. Indeed, it may have been thought that linking public trials to the accused's privileges was the most effective way of assuring a vigorous representative for the popular interest.

[16] Notably, *Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were "not within 'all criminal prosecutions' to which [the Sixth] . . . Amendment applies." *Levine* v. *United States,* 362 U. S. 610, 616 (1960); see also n. 1, *supra.*

Even more significantly for our present purpose, *Oliver* recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *id.*, at 270. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 350 (1966). Indeed, the Court focused with particularity upon the public trial guarantee "as a safeguard against any attempt to employ our courts as instruments of persecution," or "for the suppression of political and religious heresies." *Oliver*, *supra*, at 270. Thus, *Oliver* acknowledged that open trials are indispensable to First Amendment political and religious freedoms.

By the same token, a special solicitude for the public character of judicial proceedings is evident in the Court's rulings upholding the right to report about the administration of justice. While these decisions are impelled by the classic protections afforded by the First Amendment to pure communication, they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection.[17] So, in upholding a privilege for reporting truthful information about judicial misconduct proceedings, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), emphasized that public scrutiny of the operation of a judicial disciplinary body implicates a major purpose of the First Amendment—"discussion of governmental affairs," *id.*, at 839. Again, *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 559, noted that the traditional guarantee against prior restraint "should have particular force as applied to reporting of criminal proceedings. . . ." And *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975), instructed that

[17] As Mr. Justice Holmes pointed out in his opinion for the Massachusetts Supreme Judicial Court in *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884), "the privilege [to publish reports of judicial proceedings] and the access of the public to the courts stand in reason upon common ground." See *Lewis* v. *Levy*, El., Bl., & El. 537, 120 Eng. Rep. 610 (K. B. 1858).

"[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." See *Time, Inc.* v. *Firestone*, 424 U. S. 448, 473–474, 476–478 (1976) (BRENNAN, J., dissenting) (open judicial process is essential to fulfill "the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions . . .").

Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947). As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation. See *In re Oliver*, 333 U. S., at 266–268; *Gannett Co.* v. *DePasquale*, 443 U. S., at 386, n. 15; *id.*, at 418–432, and n. 11 (BLACKMUN, J., concurring and dissenting).[18] Such abiding adherence to the principle of open trials "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968).

III

Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. See, *e. g.*, *Estes* v. *Texas*, 381 U. S., at 538–539. But, as a feature of our

[18] The dictum in *Branzburg* v. *Hayes*, 408 U. S. 665, 684–685 (1972), that "[n]ewsmen . . . may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial . . . ," is not to the contrary; it simply notes that rights of access may be curtailed where there are sufficiently powerful countervailing considerations. See *supra*, at 588.

governing system of justice, the trial process serves other, broadly political, interests, and public access advances these objectives as well. To that extent, trial access possesses specific structural significance.[19]

The trial is a means of meeting "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine* v. *United States*, 362 U. S. 610, 616 (1960), quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954); accord, *Gannett Co.* v. *DePasquale*, *supra*, at 429 (BLACKMUN, J., concurring and dissenting); see *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation, see *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83, and n. 7 (1980), and the Equal Protection Clause. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. One

[19] By way of analogy, we have fashioned rules of criminal procedure to serve interests implicated in the trial process beside those of the defendant. For example, the exclusionary rule is prompted not only by the accused's interest in vindicating his own rights, but also in part by the independent "'imperative of judicial integrity.'" See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 12–13 (1968), quoting *Elkins* v. *United States*, 364 U. S. 206, 222 (1960); *United States* v. *Calandra*, 414 U. S. 338, 357–359 (1974) (BRENNAN, J., dissenting); *Olmstead* v. *United States*, 277 U. S. 438, 484–485 (1928) (Brandeis, J., dissenting); *id.*, at 470 (Holmes, J., dissenting). And several Members of this Court have insisted that criminal entrapment cannot be "countenanced" because the "obligation" to avoid "enforcement of the law by lawless means . . . goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice . . . is the transcending value at stake." *Sherman* v. *United States*, 356 U. S. 369, 380 (1958) (Frankfurter, J., concurring in result); see *United States* v. *Russell*, 411 U. S. 423, 436–439 (1973) (Douglas, J., dissenting); *id.*, at 442–443 (STEWART, J., dissenting); *Sorrells* v. *United States*, 287 U. S. 435, 455 (1932) (opinion of Roberts, J.); *Casey* v. *United States*, 276 U. S. 413, 423, 425 (1928) (Brandeis, J., dissenting).

major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration. See *In re Oliver, supra,* at 270, n. 24.

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. See *Gannett, supra,* at 428–429 (BLACKMUN, J., concurring and dissenting).

But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government.*[20] While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the

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[20] The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas. See, *e. g., Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456–457 (1957); P. Areeda, Antitrust Analysis 45–46 (2d ed. 1974) ("Sherman Act [is] . . . a general authority to do what common law courts usually do: to use certain customary techniques of judicial reasoning . . . and to develop, refine, and innovate in the dynamic common law tradition").

trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.

It follows that the conduct of the trial is pre-eminently a matter of public interest. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S., at 491–492; *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *In re Oliver*, 333 U. S., at 270—an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" *Id.*, at 271, quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827); see 3 W. Blackstone, Commentaries *372; M. Hale, History of the Common Law of England 344 (6th ed. 1820); 1 J. Bryce, The American Commonwealth 514 (rev. 1931).

Finally, with some limitations, a trial aims at true and accurate factfinding. Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties.[21]

Publicizing trial proceedings aids accurate factfinding. "Public trials come to the attention of key witnesses unknown

[21] Further, the interest in insuring that the innocent are not punished may be shared by the general public, in addition to the accused himself.

to the parties." *In re Oliver, supra,* at 270, n. 24; see *Tanksley* v. *United States,* 145 F. 2d 58, 59 (CA9 1944); 6 J. Wigmore, Evidence § 1834 (J. Chadbourn rev. 1976). Shrewd legal observers have averred that

> "open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 Blackstone, *supra,* at *373.

See *Tanksley* v. *United States, supra,* at 59–60; Hale, *supra,* at 345; 1 Bentham, *supra,* at 522–523. And experience has borne out these assertions about the truthfinding role of publicity. See Hearings on S. 290 before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 89th Cong., 1st Sess., pt. 2, pp. 433–434, 437–438 (1966).

Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding.[22] In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our "government of laws," *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803).

IV

As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced

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[22] In advancing these purposes, the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance." *In re Oliver,* 333 U. S., at 271, quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827); see *id.,* at 577–578.

by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances. With regard to the case at hand, our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open.[23] What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now,[24] for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties.[25] Accordingly, Va. Code § 19.2–266 (Supp. 1980) violates the First and Fourteenth Amendments, and the decision of the Virginia Supreme Court to the contrary should be reversed.

MR. JUSTICE STEWART, concurring in the judgment.

In *Gannett Co.* v. *DePasquale*, 443 U. S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial.[1] But the Court explicitly left

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[23] The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Cf. *Illinois* v. *Allen*, 397 U. S. 337 (1970). Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.

[24] For example, national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets. Cf. *United States* v. *Nixon*, 418 U. S. 683, 714–716 (1974).

[25] Significantly, closing a trial lacks even the justification for barring the door to pretrial hearings: the necessity of preventing dissemination of suppressible prejudicial evidence to the public before the jury pool has become, in a practical sense, finite and subject to sequestration.

[1] The Court also made clear that the Sixth Amendment does not give the accused the right to a *private* trial. 443 U. S., at 382. Cf. *Singer* v.

open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.*, at 391–393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.*, at 397–403 (concurring opinion). MR. JUSTICE REHNQUIST expressed a contrary view, *id.*, at 403–406 (concurring opinion). The remaining Members of the Court were silent on the question.

Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[2] As has been abundantly demonstrated in Part II of the opinion of THE CHIEF JUSTICE, in MR. JUSTICE BRENNAN'S opinion concurring in the judgment, and in MR. JUSTICE BLACKMUN'S opinion dissenting in part last Term in the *Gannett* case, *supra*, at 406, it has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials. The opinions referred to also convincingly explain the many good reasons why this is so. With us, a trial is by very definition a proceeding open to the press and to the public.

In conspicuous contrast to a military base, *Greer* v. *Spock*, 424 U. S. 828; a jail, *Adderley* v. *Florida*, 385 U. S. 39; or a prison, *Pell* v. *Procunier*, 417 U. S. 817, a trial courtroom is a public place. Even more than city streets, sidewalks, and

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United States, 380 U. S. 24 (Sixth Amendment right of trial by jury does not include right to be tried without a jury).

[2] It has long been established that the protections of the First Amendment are guaranteed by the Fourteenth Amendment against invasion by the States. *E. g.*, *Gitlow* v. *New York*, 268 U. S. 652. The First Amendment provisions relevant to this case are those protecting free speech and a free press. The right to speak implies a freedom to listen, *Kleindienst* v. *Mandel*, 408 U. S. 753. The right to publish implies a freedom to gather information, *Branzburg* v. *Hayes*, 408 U. S. 665, 681. See opinion of MR. JUSTICE BRENNAN concurring in the judgment, *ante*, p. 584, *passim*.

parks as areas of traditional First Amendment activity, *e. g.*, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, a trial courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on.

But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Cf. *Sheppard* v. *Maxwell*, 384 U. S. 333. Much more than a city street, a trial courtroom must be a quiet and orderly place. Compare *Kovacs* v. *Cooper*, 336 U. S. 77, with *Illinois* v. *Allen*, 397 U. S. 337, and *Estes* v. *Texas*, 381 U. S. 532. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so.[3] And while there exist many alternative ways to satisfy the constitutional demands of a fair trial,[4] those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.[5]

Since in the present case the trial judge appears to have

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[3] In such situations, representatives of the press must be assured access. *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 16 (opinion concurring in judgment).

[4] Such alternatives include sequestration of juries, continuances, and changes of venue.

[5] This is not to say that only constitutional considerations can justify such restrictions. The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial. And the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired. See, *e. g.*, *Stamicarbon, N. V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 539–542 (CA2 1974).

given no recognition to the right of representatives of the press and members of the public to be present at the Virginia murder trial over which he was presiding, the judgment under review must be reversed.

It is upon the basis of these principles that I concur in the judgment.

MR. JUSTICE BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 406 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I

The decision in this case is gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. *Ante*, at 564–569, 572–574, and n. 9. The partial dissent in *Gannett*, 443 U. S., at 419–433, took great pains in assembling—I believe adequately—the historical material and in stressing its importance to this area of the law. See also MR. JUSTICE BRENNAN'S helpful review set forth as Part II of his opinion in the present case. *Ante*, at 589–593. Although the Court in *Gannett* gave a modicum of lip service to legal history, 443 U. S., at 386, n. 15, it denied its obvious application when the defense and the prosecution, with no resistance by the trial judge, agreed that the proceeding should be closed.

The Court's return to history is a welcome change in direction.

It is gratifying, second, to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*. No fewer than 12 times in the primary opinion in that case, the Court (albeit in what seems now to have be-

come clear dicta) observed that its Sixth Amendment closure ruling applied to the *trial* itself. The author of the first concurring opinion was fully aware of this and would have restricted the Court's observations and ruling to the suppression hearing. *Id.*, at 394. Nonetheless, he *joined* the Court's opinion, *ibid.*, with its multiple references to the trial itself; the opinion was not a mere concurrence in the Court's judgment. And MR. JUSTICE REHNQUIST, in his separate concurring opinion, quite understandably observed, as a consequence, that the Court was holding "without qualification," that " 'members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials,' " *id.*, at 403, quoting from the primary opinion, *id.*, at 391. The resulting confusion among commentators [1] and journalists [2] was not surprising.

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[1] See, *e. g.*, Stephenson, Fair Trial-Free Press: Rights in Continuing Conflict, 46 Brooklyn L. Rev. 39, 63 (1979) ("intended reach of the majority opinion is unclear" (footnote omitted)); The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 65 (1979) ("widespread uncertainty over what the Court held"); Note, 51 U. Colo. L. Rev. 425, 432–433 (1980) ("*Gannett* can be interpreted to sanction the closing of trials"; citing "the uncertainty of the language in *Gannett*," and its "ambiguous sixth amendment holding"); Note, 11 Tex. Tech. L. Rev. 159, 170–171 (1979) ("perhaps much of the present and imminent confusion lies in the Court's own statement of its holding"); Borow & Kruth, Closed Preliminary Hearings, 55 Calif. State Bar J. 18, 23 (1980) ("Despite the public disclaimers . . . , the majority holding appears to embrace the right of access to trials as well as pretrial hearings"); Goodale, Gannett Means What it Says; But Who Knows What it Says?, Nat. L. J., Oct. 15, 1979, p. 20; see also Keeffe, The Boner Called Gannett, 66 A. B. A. J. 227 (1980).

[2] The press—perhaps the segment of society most profoundly affected by *Gannett*—has called the Court's decision "cloudy," Birmingham Post-Herald, Aug. 21, 1979, p. A4; "confused," Chicago Sun-Times, Sept. 20, 1979, p. 56 (cartoon); "incoherent," Baltimore Sun, Sept. 22, 1979, p. A14; "mushy," Washington Post, Aug. 10, 1979, p. A15; and a "muddle," Time, Sept. 17, 1979, p. 82, and Newsweek, Aug. 27, 1979, p. 69.

II

The Court's ultimate ruling in *Gannett*, with such clarification as is provided by the opinions in this case today, apparently is now to the effect that there is no *Sixth* Amendment right on the part of the public—or the press—to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.[3]

The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them—the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying that the course is troublesome. I need do no more than observe that uncertainty marks the nature—and strictness—of the standard of closure the Court adopts. The plurality opinion speaks of "an overriding interest articulated in findings," *ante*, at 581; MR. JUSTICE STEWART reserves, perhaps not inappropriately, "reasonable limitations," *ante*, at 600; MR. JUSTICE BRENNAN presents his separate analytical framework; MR. JUSTICE POWELL in *Gannett* was critical of those Justices who, relying on the Sixth Amendment, concluded

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[3] I shall not again seek to demonstrate the errors of analysis in the Court's opinion in *Gannett*. I note, however, that the very existence of the present case illustrates the utter fallacy of thinking, in this context, that "the public interest is fully protected by the participants in the litigation." *Gannett Co.* v. *DePasquale*, 443 U. S., at 384. Cf. *id.*, at 438–439 (opinion in partial dissent).

that closure is authorized only when "strictly and inescapably necessary," 443 U. S., at 339–400; and MR. JUSTICE REHNQUIST continues his flat rejection of, among others, the First Amendment avenue.

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. The opinion in partial dissent in *Gannett* explained that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. See 443 U. S., at 413, and n. 2, 414, 428–429, 448. See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975). It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

I also would reverse, and I join the judgment of the Court.

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert and Sullivan operetta "Iolanthe," the Lord Chancellor recites:

> "The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my Lords, embody the Law."

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case. The opinion of THE CHIEF JUSTICE states:

> "[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any

> demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." *Ante*, at 564.

The opinion of MR. JUSTICE BRENNAN states:

> "Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Ante*, at 586.

For the reasons stated in my separate concurrence in *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 403 (1979), I do not believe that either the First or Sixth Amendment, as made applicable to the States by the Fourteenth, requires that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands. And I most certainly do not believe that the Ninth Amendment confers upon us any such power to review orders of state trial judges closing trials in such situations. See *ante*, at 579, n. 15.

We have at present 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution. As said by Mr. Justice Jackson, concurring in the result in *Brown* v. *Allen*, 344 U. S. 443, 540 (1953), "we are not final because we are infallible, but we are infallible only because we are final."

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens.

But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country. In the same concurrence just quoted, Mr. Justice Jackson accurately observed that "[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states." *Id.*, at 534.

However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137 (1803), requires that this Court through ever-broadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 States.

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's "right" to a fair trial conferred by other Amendments to the Constitution; it is instead whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state-court system did in this case. Being unable to find any such prohibition in the First, Sixth, Ninth, or any other Amendment to the United States Constitution, or in the Constitution itself, I dissent.

Syllabus

INDUSTRIAL UNION DEPARTMENT, AFL–CIO *v.* AMERICAN PETROLEUM INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–911. Argued October 10, 1979—Decided July 2, 1980*

The Occupational Safety and Health Act of 1970 (Act) delegates broad authority to the Secretary of Labor (Secretary) to promulgate standards to ensure safe and healthful working conditions for the Nation's workers (the Occupational Safety and Health Administration (OSHA) being the agency responsible for carrying out this authority). Section 3 (8) of the Act defines an "occupational safety and health standard" as a standard that is "reasonably necessary or appropriate to provide safe or healthful employment." Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6 (b)(5), which directs the Secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." When the toxic material or harmful physical agent to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6 (b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated. In this case, after having determined that there is a causal connection between benzene (a toxic substance used in manufacturing such products as motor fuels, solvents, detergents, and pesticides) and leukemia (a cancer of the white blood cells), the Secretary promulgated a standard reducing the permissible exposure limit on airborne concentrations of benzene from the consensus standard of 10 parts benzene per million parts of air (10 ppm) to 1 ppm, and prohibiting dermal contact with solutions containing benzene. On pre-enforcement review, the Court of Appeals held the standard invalid because it was based on findings unsupported by the administrative record. The court concluded that OSHA had exceeded its standard-setting authority because it had not been shown that the 1 ppm exposure limit was "reasonably necessary or appropriate to provide safe and healthful employment" as required by § 3 (8), and that

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*Together with No. 78–1036, *Marshall, Secretary of Labor* v. *American Petroleum Institute et al.*, also on certiorari to the same court.

§ 6 (b)(5) did not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost.

Held: The judgment is affirmed. Pp. 630–662; 667–671; 672–688.

581 F. 2d 493, affirmed.

MR. JUSTICE STEVENS, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, and MR. JUSTICE POWELL, concluded that the standard in question is invalid. Pp. 630–652, 658–659.

(a) The Court of Appeals was correct in refusing to enforce the 1 ppm exposure limit on the ground that it was not supported by appropriate findings. OSHA's rationale for lowering the permissible exposure limit from 10 ppm to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will *not* be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemia might result from exposure to 10 ppm and that the number of cases might be reduced by lowering the exposure level to 1 ppm. Pp. 630–638.

(b) By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" as required by § 3 (8), the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." A workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm. Therefore, before the Secretary can promulgate *any* permanent health or safety standard, he must make a threshold finding that the place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6 (b)(5), as well as to other types of permanent standards, there being no reason why § 3 (8)'s definition of a standard should not be deemed incorporated by reference into § 6 (b)(5). Moreover, requiring the Secretary to make a threshold finding of significant risk is consistent with the scope of his regulatory power under § 6 (b)(5) to promulgate standards for "*toxic* materials" and "*harmful* physical agents." This interpretation is supported by other provisions of the Act, such as § 6 (g), which requires the Secretary, in determining the priority for establishing standards, to give due regard to the urgency of the need for mandatory safety and health standards for particular industries or workplaces, and § 6 (b)(8), which requires the Secretary, when he substantially alters an

existing consensus standard, to explain how the new rule will "better effectuate" the Act's purposes. Pp. 639–646.

(c) The Act's legislative history also supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm. Pp. 646–652.

(d) Where the Secretary relied on a special policy for carcinogens that imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding his threshold responsibility of establishing the need for more stringent standards, he exceeded his power. Pp. 658–659.

MR. JUSTICE STEVENS, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE STEWART, also concluded that:

1. The burden was on OSHA to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment. Here, OSHA did not even attempt to carry such burden of proof. Imposing such a burden on OSHA will not strip it of its ability to regulate carcinogens, nor will it require it to wait for deaths to occur before taking any action. The requirement that a "significant" risk be identified is not a mathematical straitjacket; OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty; and the record in this case and OSHA's own rulings on other carcinogens indicate that there are a number of ways in which OSHA can make a rational judgment about the relative significance of the risks associated with exposure to a particular carcinogen. Pp. 652–658.

2. OSHA did not make the required finding with respect to the dermal contact ban that the ban was "reasonably necessary and appropriate" to remove a significant risk of harm from such contact, but rather acted on the basis of the absolute, no-risk policy that it applies to carcinogens under the assumptions not only that benzene in small doses is a carcinogen but also that it can be absorbed through the skin in sufficient amounts to present a carcinogenic risk. These assumptions are not a proper substitute for the findings of significant risk of harm required by the Act. Pp. 659–662.

MR. JUSTICE POWELL, agreeing that neither the airborne concentration standard nor the dermal contact standard satisfied the Act's requirements, would not hold that OSHA did not even attempt to carry its burden of proof on the threshold question whether exposure to benzene at 10 ppm presents a significant risk to human health. He concluded that, even assuming OSHA had met such burden, the Act also requires OSHA to determine that the economic effects of its standard bear a

reasonable relationship to the expected benefits. A standard is neither "reasonably necessary" nor "feasible," as required by the Act, if it calls for expenditures wholly disproportionate to the expected health and safety benefits. Here, although OSHA did find that the "substantial costs" of the benzene regulations were justified, the record contains neither adequate documentation of this conclusion nor any evidence that OSHA weighed the relevant considerations. The agency simply announced its finding of cost-justification without explaining the method by which it determined that the benefits justified the costs and their economic effects. Pp. 667–671.

MR. JUSTICE REHNQUIST would invalidate, as constituting an invalid delegation of legislative authority to the Secretary, the relevant portion of § 6 (b) (5) of the Act as it applies to any toxic substance or harmful physical agent for which a safe level is, according to the Secretary, unknown or otherwise "infeasible." In the case of such substances, the language of § 6 (b) (5) gives the Secretary absolutely no indication where on the continuum of relative safety he should set the standard. Nor is there anything in the legislative history, the statutory context, or any other source traditionally examined by this Court that provides specificity to the feasibility criterion in § 6 (b) (5). Pp. 672–688.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART, J., joined, and in Parts I, II, III–A, III–B, III–C, and III–E of which POWELL, J., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 662. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 664. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 671. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined, *post*, p. 688.

George H. Cohen argued the cause for petitioner in No. 78–911. With him on the briefs were *Robert M. Weinberg, J. Albert Woll, Laurence Gold, Elliot Bredhoff*, and *George Kaufmann*. *William Alsup* argued the cause for petitioner in No. 78–1036. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Easterbrook, Benjamin W. Mintz*, and *Dennis K. Kade*.

Edward W. Warren argued the cause for respondents American Petroleum Institute et al. in both cases. With him on the brief were *Stark Ritchie, Martha Beauchamp, Neil J. King,*

John H. Pickering, Robert R. Bonczek, John F. Dickey, Robert L. Ackerly, and *Harold B. Scoggins, Jr. Charles F. Lettow* argued the cause for respondents Rubber Manufacturers Association, Inc., et al. in both cases. With him on the brief was *John C. Murphy, Jr.*†

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and MR. JUSTICE STEWART joined and in Parts I, II, III–A, III–B, III–C, and III–E of which MR. JUSTICE POWELL joined.

The Occupational Safety and Health Act of 1970 (Act), 84 Stat. 1590, 29 U. S. C. § 651 *et seq.*, was enacted for the purpose of ensuring safe and healthful working conditions for every working man and woman in the Nation. This litigation concerns a standard promulgated by the Secretary of Labor to regulate occupational exposure to benzene, a substance which has been shown to cause cancer at high exposure levels. The principal question is whether such a showing is a sufficient basis for a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible.

The Act delegates broad authority to the Secretary to promulgate different kinds of standards. The basic definition

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†Briefs of *amici curiae* urging reversal were filed by *John A. Fillion* for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; and by *Richard E. Ayres* for the Natural Resources Defense Council, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Alfred V. J. Prather* for Anaconda Co.; by *Anthony J. Obadal* and *Stephen C. Yohay* for the Capital Legal Foundation; and by *Robert V. Zener, Stephen A. Bokat,* and *William L. Kovacs* for the Chamber of Commerce of the United States.

Briefs of *amici curiae* were filed by *William J. Kilberg, Thaddeus Holt,* and *Lawrence Z. Lorber* for ASARCO Inc.; by *David B. Robinson* for the Chocolate Manufacturers Association; and by *James R. Richards* for Joseph Cimino et al.

of an "occupational safety and health standard" is found in § 3 (8), which provides:

> "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 84 Stat. 1591, 29 U. S. C. § 652 (8).

Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6 (b)(5), which provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws." 84 Stat. 1594, 29 U. S. C. § 655 (b)(5).[1]

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[1] The second and third sentences of this section, which impose feasibility limits on the Secretary and allow him to take into account the best available evidence in developing standards, may apply to all health and safety standards. This conclusion follows if the term "subsection" used in the second sentence refers to the entire subsection 6 (b) (which sets out procedures for the adoption of all types of health and safety standards), rather than simply to the toxic materials subsection, § 6 (b)(5). While MR. JUSTICE MARSHALL, *post*, at 694, and respondents agree with this

Wherever the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6 (b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated. In this case, after having determined that there is a causal connection between benzene and leukemia (a cancer of the white blood cells), the Secretary set an exposure limit on airborne concentrations of benzene of one part benzene per million parts of air (1 ppm), regulated dermal and eye contact with solutions containing benzene, and imposed complex monitoring and medical testing requirements on employers whose workplaces contain 0.5 ppm or more of benzene. 29 CFR §§ 1910.1028 (c), (e) (1979).

On pre-enforcement review pursuant to 29 U. S. C. § 655 (f), the United States Court of Appeals for the Fifth Circuit held the regulation invalid. *American Petroleum Institute* v. *OSHA*, 581 F. 2d 493 (1978). The court concluded that the Occupational Safety and Health Administration (OSHA) [2] had exceeded its standard-setting authority because it had not shown that the new benzene exposure limit was "reasonably necessary or appropriate to provide safe or healthful employment" as required by § 3 (8),[3] and because § 6 (b)(5)

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position, see Brief for Respondents American Petroleum Institute et al. 39; see also Currie, OSHA, 1976 Am. Bar Found. Research J. 1107, 1137, n. 151, the Government does not, see Brief for Federal Parties 58; see also Berger & Riskin, Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act, 7 Ecology L. Q. 285, 294 (1978). There is no need for us to decide this issue in these cases.

[2] OSHA is the administrative agency within the Department of Labor that is responsible for promulgating and enforcing standards under the Act. In this opinion, we refer to the "Secretary," "OSHA" and the "Agency" interchangeably.

[3] "The Act imposes on OSHA the obligation to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. If a standard does not fit in this definition, it is not one that OSHA is authorized to enact." 581 F. 2d, at 502.

does "not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of costs." [4] Reading the two provisions together, the Fifth Circuit held that the Secretary was under a duty to determine whether the benefits expected from the new standard bore a reasonable relationship to the costs that it imposed. *Id.*, at 503. The court noted that OSHA had made an estimate of the costs of compliance, but that the record lacked substantial evidence of any discernible benefits.[5]

We agree with the Fifth Circuit's holding that § 3 (8) requires the Secretary to find, as a threshold matter, that the

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[4] "Although 29 U. S. C. A. § 655 (b)(5) requires the goal of attaining the highest degree of health and safety protection for the employee, it does not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost. To the contrary, that section requires standards to be feasible, and it contains a number of pragmatic limitations in the form of specific kinds of information OSHA must consider in enacting standards dealing with toxic materials. Those include 'the best available evidence,' 'research, demonstrations, experiments, and such other information as may be appropriate,' 'the latest available scientific data in the field,' and 'experience gained under this and other health and safety laws.' Moreover, in standards dealing with toxic materials, just as with all other occupational safety and health standards, the conditions and other requirements imposed by the standard must be 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.' 29 U. S. C. A. § 652 (8)." *Ibid.*

[5] "The lack of substantial evidence of discernable benefits is highlighted when one considers that OSHA is unable to point to any empirical evidence documenting a leukemia risk at 10 ppm even though that has been the permissible exposure limit since 1971. OSHA's assertion that benefits from reducing the permissible exposure limit from 10 ppm to 1 ppm are likely to be appreciable, an assumption based only on inferences drawn from studies involving much higher exposure levels rather than on studies involving these levels or sound statistical projections from the high-level studies, does not satisfy the reasonably necessary requirement limiting OSHA's action. *Aqua Slide* requires OSHA to estimate the extent of expected benefits in order to determine whether those benefits bear a reasonable relationship to the standard's demonstrably high costs." *Id.*, at 503–504.

toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Unless and until such a finding is made, it is not necessary to address the further question whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or whether, as the federal parties argue, the Secretary is then required by § 6 (b)(5) to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk.

Because these are unusually important cases of first impression, we have reviewed the record with special care. In this opinion, we (1) describe the benzene standard, (2) analyze the Agency's rationale for imposing a 1 ppm exposure limit, (3) discuss the controlling legal issues, and (4) comment briefly on the dermal contact limitation.

I

Benzene is a familiar and important commodity. It is a colorless, aromatic liquid that evaporates rapidly under ordinary atmospheric conditions. Approximately 11 billion pounds of benzene were produced in the United States in 1976. Ninety-four percent of that total was produced by the petroleum and petrochemical industries, with the remainder produced by the steel industry as a byproduct of coking operations. Benzene is used in manufacturing a variety of products including motor fuels (which may contain as much as 2% benzene), solvents, detergents, pesticides, and other organic chemicals. 43 Fed. Reg. 5918 (1978).

The entire population of the United States is exposed to small quantities of benzene, ranging from a few parts per billion to 0.5 ppm, in the ambient air. Tr. 1029–1032. Over one million workers are subject to additional low-level exposures as a consequence of their employment. The majority of these employees work in gasoline service stations, benzene

production (petroleum refineries and coking operations), chemical processing, benzene transportation, rubber manufacturing, and laboratory operations.[6]

Benzene is a toxic substance. Although it could conceivably cause harm to a person who swallowed or touched it, the principal risk of harm comes from inhalation of benzene vapors. When these vapors are inhaled, the benzene diffuses through the lungs and is quickly absorbed into the blood.

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[6] OSHA's figures indicate that 795,000 service station employees have some heightened exposure to benzene as a result of their employment. See 2 U. S. Dept. of Labor, OSHA, Technology Assessment and Economic Impact Study of an OSHA Regulation for Benzene, p. D–7 (May 1977) (hereinafter Economic Impact Statement), 11 Record, Ex. 5B, p. D–7. These employees are specifically excluded from the regulation at issue in this case. See *infra*, at 628. OSHA states that another 629,000 employees, who are covered by the regulation, work in the other industries described. 43 Fed. Reg. 5935 (1978).

It is not clear from the record or its explanation of the permanent standard how OSHA arrived at the estimate of 629,000 exposed employees. OSHA's consultant, Arthur D. Little, Inc., estimated that there were 191,000 exposed employees, 30,000 of whom were exposed to 1 ppm or more of benzene. 1 Economic Impact Statement, p. 3–5, 11 Record, Ex. 5A, p. 3–5. In its explanation of the permanent standard OSHA stated that there were 1,440 exposed employees who worked in benzene plants, 98,000 in other petroleum refineries, 24,000 in coke ovens, 4,000 in light oil plants, 2,760 in the petrochemical industry, 52,345 who worked in bulk terminals, 23,471 drivers who loaded benzene from those terminals, 74,000 in oil and gas production, 17,000 in pipeline work, 100 at tank-car facilities, 200 at tank-truck facilities, 480 on barges, 11,400 in tire-manufacturing plants, and 13,050 in other types of rubber production. 43 Fed. Reg. 5936–5938 (1978). Although OSHA gave no estimate for laboratory workers, the A. D. Little study indicated that there were 25,000 exposed workers in that industry. These figures add up to 347,246 exposed employees—approximately 282,000 less than the overall estimate of 629,000. It is possible that some or all of these employees work in the "other industries" briefly described in OSHA's explanation; these are primarily small firms that manufacture adhesives, paint and ink or that use benzene solvents. *Id.*, at 5939. No estimate of the number of exposed employees in those industries or the aggregate cost of compliance by those industries is given either by OSHA or by A. D. Little in its consulting report.

Exposure to high concentrations produces an almost immediate effect on the central nervous system. Inhalation of concentrations of 20,000 ppm can be fatal within minutes; exposures in the range of 250 to 500 ppm can cause vertigo, nausea, and other symptoms of mild poisoning. 43 Fed. Reg. 5921 (1978). Persistent exposures at levels above 25–40 ppm may lead to blood deficiencies and diseases of the blood-forming organs, including aplastic anemia, which is generally fatal.

Industrial health experts have long been aware that exposure to benzene may lead to various types of nonmalignant diseases. By 1948 the evidence connecting high levels of benzene to serious blood disorders had become so strong that the Commonwealth of Massachusetts imposed a 35 ppm limitation on workplaces within its jurisdiction. In 1969 the American National Standards Institute (ANSI) adopted a national consensus standard of 10 ppm averaged over an 8-hour period with a ceiling concentration of 25 ppm for 10-minute periods or a maximum peak concentration of 50 ppm. *Id.*, at 5919. In 1971, after the Occupational Safety and Health Act was passed, the Secretary adopted this consensus standard as the federal standard, pursuant to 29 U. S. C. § 655 (a).[7]

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[7] Section 6 (a) of the Act, as set forth in 29 U. S. C. § 655 (a), provides:

"Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees."

In this case the Secretary complied with the directive to choose the most protective standard by selecting the ANSI standard of 10 ppm, rather than the 25 ppm standard adopted by the American Conference of Government Industrial Hygienists. 43 Fed. Reg. 5919 (1978).

As early as 1928, some health experts theorized that there might also be a connection between benzene in the workplace and leukemia.[8] In the late 1960's and early 1970's a number of epidemiological studies were published indicating that workers exposed to high concentrations of benzene were subject to a significantly increased risk of leukemia.[9] In a 1974 report recommending a permanent standard for benzene, the National Institute for Occupational Safety and Health

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[8] See Delore & Borgomano, Leucémie aiguë au cours de l'intoxication benzenique. Sur l'origine toxique de certaines leucémies aiguës et leurs relations avec les anémies graves, 9 Journal de Medécine de Lyon 227 (1928). A translation of that document appears in the benzene administrative record. 2 Record, Ex. 2–60. See also Hunter, Chronic Exposure to Benzene (Benzol). II. The Clinical Effects, 21 J. Ind. Hyg. & Toxicol. 331 (1939), 3 Record, Ex. 2–74, which refers to "leucemia" as a side effect of chronic exposure to benzene.

[9] Dr. Muzaffer Aksoy, a Turkish physician who testified at the hearing on the proposed benzene standard, did a number of studies concerning the effects of benzene exposure on Turkish shoemakers. The workers in Dr. Aksoy's studies used solvents containing large percentages of benzene and were constantly exposed to high concentrations of benzene vapors (between 150 and 650 ppm) under poorly ventilated and generally unhygienic conditions. See Aksoy, Acute Leukemia Due to Chronic Exposure to Benzene, 52 Am. J. of Medicine 160 (1972), 1 Record, Ex. 2–29; Aksoy, Benzene (Benzol): Its Toxicity and Effects on the Hematopoietic System, Istanbul Faculty of Medicine Monograph Series No. 51 (1970), 2 Record, Ex. 2–55; Aksoy, Erdem, & DinCol, Leukemia in Shoe-Workers Exposed Chronically to Benzene, 44 Blood 837 (1974), 2 Record, Ex. 2–53 (reporting on 26 shoeworkers who had contracted leukemia from 1967 to 1973; this represented an incidence of 13 per 100,000 rather than the 6 cases per 100,000 that would normally be expected).

Dr. Enrico Vigliani also reported an excess number of leukemia cases among Italian shoemakers exposed to glues containing a high percentage of benzene and workers in rotogravure plants who had been exposed over long periods of time to inks and solvents containing as much as 60% benzene. See Vigliani & Saita, Benzene and Leukemia, 271 New Eng. J. of Medicine 872–876 (1964), 1 Record, Ex. 2–27; Forni & Vigliani, Chemical Leukemogenesis in Man, 7 Ser. Haemat. 211 (1974), 2 Record, Ex. 2–50.

(NIOSH), OSHA's research arm,[10] noted that these studies raised the "distinct possibility" that benzene caused leukemia. But, in light of the fact that all known cases had occurred at very high exposure levels, NIOSH declined to recommend a change in the 10 ppm standard, which it considered sufficient to protect against nonmalignant diseases. NIOSH suggested that further studies were necessary to determine conclusively whether there was a link between benzene and leukemia and, if so, what exposure levels were dangerous.[11]

Between 1974 and 1976 additional studies were published which tended to confirm the view that benzene can cause leukemia, at least when exposure levels are high.[12] In an

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[10] Title 29 U. S. C. § 669 (a)(3) requires the Department of Health, Education, and Welfare (HEW) (now in part the Department of Health and Human Services) to develop "criteria" dealing with toxic materials and harmful physical agents that describe "exposure levels that are safe for various periods of employment." HEW's obligations under this section have been delegated to NIOSH, 29 U. S. C. § 671.

[11] See Dept. of HEW, NIOSH, Criteria for a Recommended Standard—Occupational Exposure to Benzene 74–75 (Pub. No. 74–137, 1974), 1 Record, Ex. 2–3. In response to a letter from the Director of the Office of Standards Division, NIOSH stated that its 10 ppm standard was designed to protect against leukemia, as well as other health risks. NIOSH noted, however, that further research was necessary in order to establish adequate dose-response data for benzene and leukemia. 12 Record, Ex. 32A, 32B.

[12] Aksoy published another study in 1976 reporting on an additional eight leukemia cases uncovered after 1973. In that article, he also noted that a 1969 ban on the use of benzene as a solvent had led to a decline in the number of reported leukemia cases beginning in 1974. Aksoy, Types of Leukemia in Chronic Benzene Poisoning, 55 Acta Haematologica 65 (1976), 1 Record, Ex. 2–30. Vigliani also noted a decline in leukemia cases in Italy after benzene was no longer used in glues and inks. See Vigliani & Forni, Benzene and Leukemia, 11 Environmental Res. 122 (1976), 1 Record, Ex. 2–15; Vigliani, Leukemia Associated with Benzene Exposure, 271 Annals N. Y. Acad. of Sciences 143 (1976), 2 Record, Ex. 2–49. In the latter study Vigliani noted that in the past 100% pure ben-

August 1976 revision of its earlier recommendation, NIOSH stated that these studies provided "conclusive" proof of a causal connection between benzene and leukemia. 1 Record, Ex. 2–5, p. 100. Although it acknowledged that none of the intervening studies had provided the dose-response data it had found lacking two years earlier, *id.*, at 9, NIOSH nevertheless recommended that the exposure limit be set as low as possible. As a result of this recommendation, OSHA contracted with a consulting firm to do a study on the costs to industry of complying with the 10 ppm standard then in effect or, alternatively, with whatever standard would be the lowest feasible. Tr. 505–506.

In October 1976, NIOSH sent another memorandum to OSHA, seeking acceleration of the rulemaking process and "strongly" recommending the issuance of an emergency temporary standard pursuant to § 6 (c) of the Act, 29 U. S. C. § 655 (c),[13] for benzene and two other chemicals believed to

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zene solvents had been used and workers had been exposed on a prolonged basis to concentrations of 200–500 ppm, with peaks of up to 1500 ppm.

A number of epidemiological studies were also done among American rubber workers during this period. Dr. A. J. McMichael's studies indicated a ninefold increase in the risk of contracting leukemia among workers who were heavily exposed in the 1940's and 1950's to pure benzene used as a solvent. McMichael, Spirtas, Kupper, & Gamble, Solvent Exposure and Leukemia Among Rubber Workers: An Epidemiologic Study, 17 J. of Occup. Med. 234, 238 (1975), 2 Record, Ex. 2–37. See also Andjelkovic, Taulbee, & Symons, Mortality Experience of a Cohort of Rubber Workers, 1964–1973, 18 J. of Occup. Med. 387 (1976), 2 Record, Ex. 2–54 (also indicating an excess mortality rate from leukemia among rubber workers).

[13] Section 655 (c) provides:

"(1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from

be carcinogens. NIOSH recommended that a 1 ppm exposure limit be imposed for benzene.[14] 1 Record, Ex. 2–6. Apparently because of the NIOSH recommendation, OSHA asked its consultant to determine the cost of complying with a 1 ppm standard instead of with the "minimum feasible" standard. Tr. 506–507. It also issued voluntary guidelines for benzene, recommending that exposure levels be limited to 1 ppm on an 8-hour time-weighted average basis wherever possible. 2 Record, Ex. 2–44.

In the spring of 1976, NIOSH had selected two Pliofilm plants in St. Marys and Akron, Ohio, for an epidemiological study of the link between leukemia and benzene exposure. In April 1977, NIOSH forwarded an interim report to OSHA indicating at least a fivefold increase in the expected incidence of leukemia for workers who had been exposed to ben-

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new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

"(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

"(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection."

[14] At the hearing on the permanent standard NIOSH representatives testified that they had selected 1 ppm initially in connection with the issuance of a proposed standard for vinyl chloride. In that proceeding they had discovered that 1 ppm was approximately the lowest level detectable through the use of relatively unsophisticated monitoring instruments. With respect to benzene, they also thought that 1 ppm was an appropriate standard because any lower standard might require the elimination of the small amounts of benzene (in some places up to 0.5 ppm) that are normally present in the atmosphere. Tr. 1142–1143. NIOSH's recommendation was *not* based on any evaluation of the feasibility, either technological or economic, of eliminating all exposures above 1 ppm. *Id.*, at 1156.

zene at the two plants from 1940 to 1949.[15] The report submitted to OSHA erroneously suggested that exposures in the two plants had generally been between zero and 15 ppm during the period in question.[16] As a result of this new evidence

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[15] Seven fatalities from leukemia were discovered out of the 748 workers surveyed. However, Dr. Infante, who conducted the study, stated that his statistical techniques had probably underestimated the number of leukemia cases that had actually occurred. *Id.*, at 747. The normal expected incidence of leukemia in such a population would be 1.4. 2 Record, Ex. 2–51, p. 6.

[16] The authors' statement with respect to exposure levels was based on a 1946 report by the Ohio Industrial Commission indicating that, after some new ventilation equipment had been installed, exposures at the St. Marys plant had been brought within "safe" limits, in most instances ranging from zero to 10 to 15 ppm. *Id.*, at 3. As the authors later admitted, the level considered "safe" in 1946 was 100 ppm. Tr. 814–815. Moreover, only one of the seven workers who died of leukemia had begun working at St. Marys after 1946. Five of the others had worked at the Akron plant, which employed 310 of the 748 workers surveyed. *Id.*, at 2537–2538. A 1948 report by the Ohio Department of Health indicated exposure levels at the Akron plant of well over 100 ppm, with excursions in some areas up tc 1,000 ppm. 17 Record, Ex. 84A, App. A, pp. 61–62. Surveys taken in the intervening years, as well as testimony by St. Marys employees at the hearing on the proposed standard, Tr. 3432–3437, indicated that both of the plants may have had relatively high exposures through the 1970's.

Industry representatives argued at the hearing that this evidence indicated that the exposure levels had been very high, as they had been in the other epidemiological studies conducted in the past. See Post-Hearing Brief for American Petroleum Institute in No. H–059 (OSHRC), pp. 23–37, 31 Record, Ex. 217–33, pp. 23–37. NIOSH witnesses, however, simply stated that actual exposure levels for the years in question could not be determined; they did agree, however, that their study should *not* be taken as proof of a fivefold increase in leukemia risk at 10–15 ppm. Tr. 814–815. In its explanation of the permanent standard, OSHA agreed with the NIOSH witnesses that no dose-response relationship could be inferred from the study:

"Comments at the hearing demonstrated that there were area exposures during this study period exceeding these levels [10–15 ppm], at times reaching values of hundreds of parts per million. Since no personal moni-

and the continued prodding of NIOSH, 1 Record, Ex. 2–7, OSHA did issue an emergency standard, effective May 21, 1977, reducing the benzene exposure limit from 10 ppm to 1 ppm, the ceiling for exposures of up to 10 minutes from 25 ppm to 5 ppm, and eliminating the authority for peak concentrations of 50 ppm. 42 Fed. Reg. 22516 (1977). In its explanation accompanying the emergency standard, OSHA stated that benzene had been shown to cause leukemia at exposures below 25 ppm and that, in light of its consultant's report, it was feasible to reduce the exposure limit to 1 ppm. *Id.*, at 22517, 22521.

On May 19, 1977, the Court of Appeals for the Fifth Circuit entered a temporary restraining order preventing the emergency standard from taking effect. Thereafter, OSHA abandoned its efforts to make the emergency standard effective and instead issued a proposal for a permanent standard patterned almost entirely after the aborted emergency standard. *Id.*, at 27452.

In its published statement giving notice of the proposed permanent standard, OSHA did not ask for comments as to whether or not benzene presented a significant health risk at exposures of 10 ppm or less. Rather, it asked for comments as to whether 1 ppm was the minimum feasible exposure limit.[17] *Ibid.* As OSHA's Deputy Director of Health Standards, Grover Wrenn, testified at the hearing, this formulation

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toring data are available, any conclusion regarding the actual individual time-weighted average exposure is speculative. Because of the lack of definitive exposure data, OSHA cannot derive any conclusions linking the excess leukemia risk observed with any specific exposure level." 43 Fed. Reg. 5927 (1978).

[17] OSHA also sought public comment as to whether certain industries should be exempt from compliance, whether the proposed compliance procedures and labeling techniques were adequate, what the environmental and economic consequences of the regulation would be, and whether it was feasible to replace benzene in solvents and other products of which it constituted more than 1%.

of the issue to be considered by the Agency was consistent with OSHA's general policy with respect to carcinogens.[18] Whenever a carcinogen is involved, OSHA will presume that no safe level of exposure exists in the absence of clear proof establishing such a level and will accordingly set the exposure limit at the lowest level feasible.[19] The proposed 1 ppm ex-

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[18] It became clear at the hearing that OSHA had not promulgated the proposed standard in response to any new concern about the nonmalignant effects of low-level benzene exposure. See Tr. 126–127:

"Is it accurate to say that the reason why the—why OSHA has proposed to reduce the exposure limits in the standard below the current levels is because of a perceived risk of leukemia, and not because of any new evidence it has received that the current standards are inadequate to protect against acute or chronic benzene toxicity, other than leukemia?

"MR. WRENN: I think I will simply refer the part of my statement you were referring to, in which it says, it is however benzene's leukemogenicity which is of greatest concern to OSHA. That is certainly the central issue within the ETS [emergency temporary standard] and the proposed standard."

[19] Mr. Wrenn testified:

"The proposed standard requires that employee exposure to benzene in air be reduced to one part per million, with a five part per million ceiling allowable over any fifteen minute period during an eight hour work shift, and prohibits eye or prolonged skin contact with liquid benzene.

"This airborne exposure limit is based on OSHA's established regulatory policy, that in the absence of a demonstrated safe level, or a no effect level for a carcinogen, it will be assumed that none exist, and that the agency will attempt to limit employee exposure to the lowest level feasible." *Id.*, at 29–30.

See also:

"MR. WARREN: Mr. Wrenn, in promulgating the emergency temporary, and proposed permanent, benzene standards, OSHA relies heavily, and I am quoting from your testimony now, on the regulatory policy that there is no safe level for carcinogens at any—for any exposed population, and the fact that leukemia, and a leukemogen is a carcinogen, is that correct?

"MR. WRENN: I believe that I stated that slightly differently in my oral summary of the statement than it is stated in the statement itself. I said that in the absence of a known or demonstrated safe level or no

posure limit in this case thus was established not on the basis of a proven hazard at 10 ppm, but rather on the basis of "OSHA's best judgment at the time of the proposal of the feasibility of compliance with the proposed standard by the [a]ffected industries." Tr. 30. Given OSHA's cancer policy, it was in fact irrelevant whether there was any evidence at all of a leukemia risk at 10 ppm. The important point was that there was no evidence that there was *not* some risk, however small, at that level. The fact that OSHA did not ask for comments on whether there was a safe level of exposure for benzene was indicative of its further view that a demonstration of such absolute safety simply could not be made.[20]

Public hearings were held on the proposed standard, commencing on July 19, 1977. The final standard was issued on February 10, 1978. 29 CFR § 1910.1028 (1979).[21] In its final form, the benzene standard is designed to protect workers from whatever hazards are associated with low-level benzene

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effect level, our policy is to assume that none exists, and to regulate accordingly." *Id.*, at 48–49.

"MR. WRENN: I would prefer to state it as I have on a couple of occasions already this morning, and that in the absence of a demonstrated safe level of exposure, we will assume that none exists for the purpose of regulatory policy." *Id.*, at 50.

[20] In answer to the question of what demonstration would suffice to establish a "safe level," Mr. Wrenn stated:

"I would like to draw a distinction, however, between what I have referred to as the demonstration that a safe level exists, and speculation or elaborate theories that one may make, and I think that the agency in its history and very likely its future regulatory policy, would, in the face of evidence demonstrating that a carcinogenic hazard does exist or did exist, in this particular set of circumstances, would be very reluctant to accept as the basis for its regulatory decisions, a theoretical argument that a safe level may, in fact, exist for a particular substance." *Id.*, at 51–52.

A NIOSH representative who testified later put it more succinctly, stating that ". . . if benzene causes leukemia, and if leukemia is a cancer, then exposure really is almost moot." *Id.*, at 1007.

[21] An amendment to the standard was promulgated on June 27, 1978. 43 Fed. Reg. 27962. See n. 22, *infra*.

exposures by requiring employers to monitor workplaces to determine the level of exposure, to provide medical examinations when the level rises above 0.5 ppm, and to institute whatever engineering or other controls are necessary to keep exposures at or below 1 ppm.

In the standard as originally proposed by OSHA, the employer's duty to monitor, keep records, and provide medical examinations arose whenever *any* benzene was present in a workplace covered by the rule.[22] Because benzene is omnipresent in small quantities, NIOSH and the President's Council on Wage and Price Stability recommended the use of an "action level" to trigger monitoring and medical examination requirements. Tr. 1030–1032; App. 121–133. OSHA accepted this recommendation, providing under the final standard that, if initial monitoring discloses benzene concentrations below 0.5 ppm averaged over an 8-hour work day, no further action is required unless there is a change in the company's practices.[23] If exposures are above the action

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[22] Apart from its exclusion of gasoline storage and distribution facilities (an exclusion retained in the final rule, see text, at n. 25, *infra*), the proposed rule also excluded from coverage work operations in which liquid mixtures containing 1% or less benzene were used. After a year this exclusion was to be narrowed to operations where 0.1% benzene solutions were used. The rationale for the exclusion was that airborne exposures from such liquids would generally be within the 1 ppm limit. However, testimony at the hearing on the proposed rule indicated that there was no "consistent predictable relationship" between benzene content in a liquid and the resulting airborne exposure. Therefore, OSHA abandoned the idea of a percentage exclusion for liquid benzene in its final standard. 43 Fed. Reg. 5942 (1978).

OSHA later reconsidered its position and, in an amendment to the permanent standard, reinstated an exclusion for liquids, setting the level at 0.5%, to be reduced to 0.1% after three years, *id.*, at 27962.

[23] The exemption from the monitoring and medical testing portions of the standard for workplaces with benzene exposure levels below 0.5 ppm was not predicated on any finding that regulation of such workplaces was not feasible. OSHA's consultant, Arthur D. Little, Inc., concluded that 1 ppm was a feasible exposure limit even assuming that there was no

level, but below the 1 ppm exposure limit, employers are required to monitor exposure levels on a quarterly basis and to provide semiannual medical examinations for their exposed employees. Neither the concept of an action level, nor the specific level selected by OSHA, is challenged in this proceeding.

Whenever initial monitoring indicates that employees are subject to airborne concentrations of benzene above 1 ppm averaged over an 8-hour workday, with a ceiling of 5 ppm for any 15-minute period, employers are required to modify their plants or institute work practice controls to reduce exposures within permissible limits. Consistent with OSHA's general policy, the regulation does not allow respirators to be used if engineering modifications are technologically feasible.[24] Employers in this category are also required to perform monthly monitoring so long as their workplaces remain above 1 ppm, provide semiannual medical examinations to exposed workers, post signs in and restrict access to "regulated areas" where the permissible exposure limit is exceeded, and conduct employee training programs where necessary.

The standard also places strict limits on exposure to liquid

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action level (or, to put it another way, assuming that the action level was zero). Rather, it was, as NIOSH witnesses stated, a practical decision based on a determination that, where benzene exposures are below 0.5 ppm, they will be unlikely ever to rise above the permissible exposure level of 1 ppm. NIOSH was also concerned that, in the absence of an action level, employers who used sophisticated analytical equipment might be required to monitor and provide medical examinations simply because of the presence of benzene in the ambient air. Tr. 1030–1032, 1133–1134.

[24] Indeed, in its explanation of the standard OSHA states that an employer is required to institute engineering controls (for example, installing new ventilation hoods) even if those controls are insufficient, by themselves, to achieve compliance and respirators must therefore be used as well. 43 Fed. Reg. 5952 (1978). OSHA's preference for engineering modifications is based on its opinion that respirators are rarely used properly (because they are uncomfortable, are often not properly fitted, etc.) and therefore cannot be considered adequate protective measures.

benzene. As originally framed, the standard totally prohibited any skin or eye contact with any liquid containing any benzene. Ultimately, after the standard was challenged, OSHA modified this prohibition by excluding liquids containing less than 0.5% benzene. After three years, that exclusion will be narrowed to liquids containing less than 0.1% benzene.

The permanent standard is expressly inapplicable to the storage, transportation, distribution, sale, or use of gasoline or other fuels subsequent to discharge from bulk terminals.[25] This exception is particularly significant in light of the fact that over 795,000 gas station employees, who are exposed to an average of 102,700 gallons of gasoline (containing up to 2% benzene) annually, are thus excluded from the protection of the standard.[26]

As presently formulated, the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees. According to OSHA's figures, the standard will require capital investments in engineering controls of approximately $266 million, first-year operating costs (for monitoring, medical testing, employee training, and respirators) of $187 million to $205 million and

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[25] It is also inapplicable to work operations involving 0.5% liquid benzene (0.1% after three years), see n. 22, *supra*, and to the handling of benzene in sealed containers or systems, except insofar as employers are required to provide cautionary notices and appropriate employee training.

[26] Prior to the introduction of the action-level concept, A. D. Little estimated that compliance costs for the service station industry might be as high as $4 billion. Tr. 508–509. Moreover, A. D. Little's Economic Impact Statement indicated that service station employees were generally exposed to very low levels of benzene. 1 Economic Impact Statement, p. 4–21, 11 Record, Ex. 5A, p. 4–21. Still, in its explanation accompanying the permanent standard OSHA did not rule out regulation of this industry entirely, stating that it was in the process of studying whether and to what extent it should regulate exposures to gasoline in general. 43 Fed. Reg. 5943 (1978).

recurring annual costs of approximately $34 million.[27] 43 Fed. Reg. 5934 (1978). The figures outlined in OSHA's explanation of the costs of compliance to various industries indicate that only 35,000 employees would gain any benefit from the regulation in terms of a reduction in their exposure to benzene.[28] Over two-thirds of these workers (24,450) are employed in the rubber-manufacturing industry. Compliance costs in that industry are estimated to be rather low with no capital costs and initial operating expenses estimated at only $34 million ($1,390 per employee); recurring annual costs would also be rather low, totaling less than $1 million. By contrast, the segment of the petroleum refining industry that produces benzene would be required to incur $24 million in capital costs and $600,000 in first-year operating expenses to provide additional protection for 300 workers ($82,000 per employee), while the petrochemical industry would be required to incur $20.9 million in capital costs and $1 million in initial operating expenses for the benefit of 552 employees ($39,675 per employee).[29] *Id.*, at 5936–5938.

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[27] OSHA's estimate of recurring annual costs was based on the assumption that the exposure levels it had projected would be confirmed by initial monitoring and that, after the first year, engineering controls would be successful in bringing most exposures within the 1 ppm limit. Under these circumstances, the need for monitoring, medical examinations, and respirators would, of course, be drastically reduced.

[28] Three hundred of these employees work in benzene plants, 5,000 in other petroleum refineries, 4,000 in light oil plants, 552 in the petrochemical industry, 156 in benzene transportation, 1,250 in laboratories, 11,400 in tire-manufacturing plants, and 13,050 in other rubber-manufacturing plants. OSHA also estimated that another 16,216 workers (5,000 in petroleum refineries, 1,104 in the petrochemical industry, 7,300 in bulk terminals, 312 in benzene transportation, and 2,500 in laboratories) would be exposed to 0.5 to 1 ppm of benzene and thus would receive a benefit in terms of more comprehensive medical examinations. *Id.*, at 5936–5938.

[29] The high cost per employee in the latter two industries is attributable to OSHA's policy of requiring engineering controls rather than allowing respirators to be used to reduce exposures to the permissible limit. The

Although OSHA did not quantify the benefits to each category of worker in terms of decreased exposure to benzene, it appears from the economic impact study done at OSHA's direction that those benefits may be relatively small. Thus, although the current exposure limit is 10 ppm, the actual exposures outlined in that study are often considerably lower. For example, for the period 1970–1975 the petrochemical industry reported that, out of a total of 496 employees exposed to benzene, only 53 were exposed to levels between 1 and 5 ppm and only 7 (all at the same plant) were exposed to between 5 and 10 ppm. 1 Economic Impact Statement, p. 4–6, Table 4–2, 11 Record, Ex. 5A, p. 4–6, Table 4–2. See also *id.*, Tables 4.3–4.8 (indicating sample exposure levels in various industries).

II

The critical issue at this point in the litigation is whether the Court of Appeals was correct in refusing to enforce the 1 ppm exposure limit on the ground that it was not supported by appropriate findings.[30]

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relatively low estimated cost per employee in the rubber industry is based on OSHA's assumption that other solvents and adhesives can be substituted for those that contain benzene and that capital costs will therefore not be required.

[30] The other issue before us is whether the Court of Appeals correctly refused to enforce the dermal contact ban. That issue is discussed in Part IV, *infra*.

In the court below respondents also challenged the monitoring and medical testing requirements, arguing that certain industries should have been totally exempt from them and that, as to other industries, the Agency had not demonstrated that all the requirements were reasonably necessary to ensure worker health and safety. They also argued that OSHA's requirement that the permissible exposure limit be met through engineering controls rather than through respirators was not reasonably necessary under the Act. Because it invalidated the 1 ppm exposure limit, the Fifth Circuit had no occasion to deal with these issues, and they are not now before this Court.

Any discussion of the 1 ppm exposure limit must, of course, begin with the Agency's rationale for imposing that limit.[31] The written explanation of the standard fills 184 pages of the printed appendix. Much of it is devoted to a discussion of the voluminous evidence of the adverse effects of exposure to benzene at levels of concentration well above 10 ppm. This discussion demonstrates that there is ample justification for regulating occupational exposure to benzene and that the prior limit of 10 ppm, with a ceiling of 25 ppm (or a peak of 50 ppm) was reasonable. It does not, however, provide direct support for the Agency's conclusion that the limit should be reduced from 10 ppm to 1 ppm.

The evidence in the administrative record of adverse effects of benzene exposure at 10 ppm is sketchy at best. OSHA noted that there was "no dispute" that certain nonmalignant blood disorders, evidenced by a reduction in the level of red or white cells or platelets in the blood, could result from exposures of 25–40 ppm. It then stated that several studies had indicated that relatively slight changes in normal blood values could result from exposures below 25 ppm and perhaps below 10 ppm. OSHA did not attempt to make any estimate based on these studies of how significant the risk of nonmalignant disease would be at exposures of 10 ppm or less.[32] Rather, it stated that because of the lack of data concerning the linkage between low-level exposures and blood abnormalities, it was impossible to construct a dose-response

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[31] As we have often held, the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397; *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249.

[32] As OSHA itself noted, some blood abnormalities caused by benzene exposure may not have any discernible health effects, while others may lead to significant impairment and even death. 43 Fed. Reg. 5921 (1978).

curve at this time.[33] OSHA did conclude, however, that the studies demonstrated that the current 10 ppm exposure limit was inadequate to ensure that no single worker would suffer a nonmalignant blood disorder as a result of benzene exposure. Noting that it is "customary" to set a permissible exposure limit by applying a safety factor of 10–100 to the lowest level at which adverse effects had been observed, the Agency stated that the evidence supported the conclusion that the limit should be set at a point "substantially less than 10 ppm" even if benzene's leukemic effects were not considered. 43 Fed. Reg. 5924–5925 (1978). OSHA did not state, however, that the nonmalignant effects of benzene exposure justified a reduction in the permissible exposure limit to 1 ppm.[34]

OSHA also noted some studies indicating an increase in chromosomal aberrations in workers chronically exposed to

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[33] "A dose-response curve shows the relationship between different exposure levels and the risk of cancer [or any other disease] associated with those exposure levels. Generally, exposure to higher levels carries with it a higher risk, and exposure to lower levels is accompanied by a reduced risk." 581 F. 2d, at 504, n. 24.

OSHA's comments with respect to the insufficiency of the data were addressed primarily to the lack of data at low exposure levels. OSHA did not discuss whether it was possible to make a rough estimate, based on the more complete epidemiological and animal studies done at higher exposure levels, of the significance of the risks attributable to those levels, nor did it discuss whether it was possible to extrapolate from such estimates to derive a risk estimate for low-level exposures.

[34] OSHA did not invoke the automatic rule of reducing exposures to the lowest limit feasible that it applies to cancer risks. Instead, the Secretary reasoned that prudent health policy merely required that the permissible exposure limit be set "sufficiently below the levels at which adverse effects have been observed to assure adequate protection for all exposed employees." 43 Fed. Reg. 5925 (1978). While OSHA concluded that application of this rule would lead to an exposure limit "substantially less than 10 ppm," it did not state either what exposure level it considered to present a significant risk of harm or what safety factor should be applied to that level to establish a permissible exposure limit.

concentrations of benzene "probably less than 25 ppm." [35] However, the Agency took no definitive position as to what these aberrations meant in terms of demonstrable health effects and stated that no quantitative dose-response relationship had yet been established. Under these circumstances, chromosomal effects were categorized by OSHA as an "adverse biological event of serious concern which may pose or reflect a potential health risk and as such, must be considered in the larger purview of adverse health effects associated with benzene. *Id.*, at 5932–5934.

With respect to leukemia, evidence of an increased risk (*i. e.*, a risk greater than that borne by the general population) due to benzene exposures at or below 10 ppm was even sketchier. Once OSHA acknowledged that the NIOSH study it had relied upon in promulgating the emergency standard did not support its earlier view that benzene had been shown to cause leukemia at concentrations below 25 ppm, see n. 12, *supra*, there was only one study that provided any evidence of such an increased risk. That study, conducted by the Dow Chemical Co., uncovered three leukemia deaths, versus 0.2 expected deaths, out of a population of 594 workers; it appeared that the three workers had never been exposed to more than 2 to 9 ppm of benzene. The authors of the study, however, concluded that it could not be viewed as proof of a relationship between low-level benzene exposure and leukemia because all three workers had probably been occupationally exposed to a number of other potentially carcinogenic chemicals at other points in their careers and because no leukemia deaths had been uncovered among workers who had been exposed to much higher levels of benzene. In its explanation of the permanent standard, OSHA stated that the possibility that these three leukemias had been caused by benzene exposure could not be

[35] While citing these studies, OSHA also noted that other studies of similarly exposed workers had not indicated any increased level of chromosome damage.

ruled out and that the study, although not evidence of an increased risk of leukemia at 10 ppm, was therefore "consistent with the findings of many studies that there is an excess leukemia risk among benzene exposed employees." 43 Fed. Reg. 5928 (1978). The Agency made no finding that the Dow study, any other empirical evidence, or any opinion testimony demonstrated that exposure to benzene at or below the 10 ppm level had ever in fact caused leukemia. See 581 F. 2d, at 503, where the Court of Appeals noted that OSHA was "unable to point to any empirical evidence documenting a leukemia risk at 10 ppm. . . ."

In the end OSHA's rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will *not* be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by reducing the exposure level to 1 ppm. In reaching that result, the Agency first unequivocally concluded that benzene is a human carcinogen.[36] Second, it concluded that industry had failed to prove that there is a safe threshold level of exposure to benzene below which no excess leukemia cases would occur. In reaching this conclusion OSHA rejected industry contentions that certain epidemiological studies indicating no excess risk of leukemia among workers exposed at levels below 10 ppm were sufficient to establish that the threshold level of safe exposure was at or above

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[36] "The evidence in the record conclusively establishes that benzene is a human carcinogen. The determination of benzene's leukemogenicity is derived from the evaluation of all the evidence in totality and is not based on any one particular study. OSHA recognizes, as indicated above that individual reports vary considerably in quality, and that some investigations have significant methodological deficiencies. While recognizing the strengths and weaknesses in individual studies, OSHA nevertheless concludes that the benzene record as a whole clearly establishes a causal relationship between benzene and leukemia." *Id.*, at 5931.

10 ppm.[37] It also rejected an industry witness' testimony that a dose-response curve could be constructed on the basis of the reported epidemiological studies and that this curve indicated that reducing the permissible exposure limit from 10 to 1 ppm would prevent at most one leukemia and one other cancer death every six years.[38]

Third, the Agency applied its standard policy with respect to carcinogens,[39] concluding that, in the absence of definitive

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[37] In rejecting these studies, OSHA stated that: "Although the epidemiological method can provide strong evidence of a causal relationship between exposure and disease in the case of positive findings, it is by its very nature relatively crude and an insensitive measure." After noting a number of specific ways in which such studies are often defective, the Agency stated that it is "OSHA's policy when evaluating negative studies, to hold them to higher standards of methodological accuracy." *Id.*, at 5931–5932. Viewing the industry studies in this light, OSHA concluded that each of them had sufficient methodological defects to make them unreliable indicators of the safety of low-level exposures to benzene.

[38] OSHA rejected this testimony in part because it believed the exposure data in the epidemiological studies to be inadequate to formulate a dose-response curve. It also indicated that even if the testimony was accepted—indeed as long as there was any increase in the risk of cancer—the Agency was under an obligation to "select the level of exposure which is most protective of exposed employees." *Id.*, at 5941.

[39] In his dissenting opinion, MR. JUSTICE MARSHALL states that the Agency did not rely "blindly on some Draconian carcinogen 'policy'" in setting a permissible exposure limit for benzene. He points to the large number of witnesses the Agency heard and the voluminous record it compiled as evidence that it relied instead on the particular facts concerning benzene. With all due respect, we disagree with MR. JUSTICE MARSHALL's interpretation of the Agency's rationale for its decision. After hearing the evidence, the Agency relied on the same policy view it had stated at the outset, see *supra*, at 623–625, namely, that, in the absence of clear evidence to the contrary, it must be assumed that no safe level exists for exposure to a carcinogen. The Agency also reached the entirely predictable conclusion that industry had not carried its concededly impossible burden, see n. 41, *infra*, of proving that a safe level of exposure exists for benzene. As the Agency made clear later in its proposed generic cancer policy, see n. 51, *infra*, it felt compelled to allow industry witnesses to go over the same ground in each regulation dealing with a carcinogen, despite

proof of a safe level, it must be assumed that *any* level above zero presents *some* increased risk of cancer.[40] As the federal parties point out in their brief, there are a number of scientists and public health specialists who subscribe to this view, theorizing that a susceptible person may contract cancer from the absorption of even one molecule of a carcinogen like benzene. Brief for Federal Parties 18–19.[41]

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its policy view. The generic policy, which has not yet gone into effect, was specifically designed to eliminate this duplication of effort in each case by foreclosing industry from arguing that there is a safe level for the particular carcinogen being regulated. 42 Fed. Reg. 54154–54155 (1977).

[40] "As stated above, the positive studies on benzene demonstrate the causal relationship of benzene to the induction of leukemia. Although these studies, for the most part involve high exposure levels, it is OSHA's view that once the carcinogenicity of a substance has been established qualitatively, any exposure must be considered to be attended by risk when considering any given population. OSHA therefore believes that occupational exposure to benzene at low levels poses a carcinogenic risk to workers." 43 Fed. Reg. 5932 (1978).

[41] The so-called "one hit" theory is based on laboratory studies indicating that one molecule of a carcinogen may react in the test tube with one molecule of DNA to produce a mutation. The theory is that, if this occurred in the human body, the mutated molecule could replicate over a period of years and eventually develop into a cancerous tumor. See OSHA's Proposed Rule on the Identification, Classification and Regulation of Toxic Substances Posing a Potential Carcinogenic Risk, 42 Fed. Reg. 54148, 54165–54167 (1977). Industry witnesses challenged this theory, arguing that the presence of several different defense mechanisms in the human body make it unlikely that a person would actually contract cancer as a result of absorbing one carcinogenic molecule. Thus, the molecule might be detoxified before reaching a critical site, damage to a DNA molecule might be repaired, or a mutated DNA molecule might be destroyed by the body's immunological defenses before it could develop into a cancer. Tr. 2836.

In light of the improbability of a person's contracting cancer as a result of a single hit, a number of the scientists testifying on both sides of the issue agreed that every individual probably does have a threshold exposure limit below which he or she will not contract cancer. See, *e. g.*, *id.*, at 1179–1181. The problem, however, is that individual susceptibility appears to vary greatly and there is at present no way to calculate each

Fourth, the Agency reiterated its view of the Act, stating that it was required by § 6 (b)(5) to set the standard either at the level that has been demonstrated to be safe or at the lowest level feasible, whichever is higher. If no safe level is established, as in this case, the Secretary's interpretation of the statute automatically leads to the selection of an exposure limit that is the lowest feasible.[42] Because of benzene's importance to the economy, no one has ever suggested that it would be feasible to eliminate its use entirely, or to try to limit exposures to the small amounts that are omnipresent. Rather, the Agency selected 1 ppm as a workable exposure level, see n. 14, *supra,* and then determined that compliance with that level was technologically feasible and that "the economic impact of . . . [compliance] will not be such as to threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978). It therefore held that 1 ppm was the minimum feasible exposure level within the meaning of § 6 (b)(5) of the Act.

Finally, although the Agency did not refer in its discussion of the pertinent legal authority to any duty to identify the anticipated benefits of the new standard, it did conclude that some benefits were likely to result from reducing the exposure limit from 10 ppm to 1 ppm. This conclusion was based, again, not on evidence, but rather on the assumption that the risk of leukemia will decrease as exposure levels decrease. Although the Agency had found it impossible to construct a dose-response curve that would predict with any accuracy the

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and every person's threshold. Thus, even industry witnesses agreed that if the standard must ensure with absolute certainty that every single worker is protected from any risk of leukemia, only a zero exposure limit would suffice. *Id.,* at 2492, 2830.

[42] "There is no doubt that benzene is a carcinogen and must, for the protection and safety of workers, be regulated as such. Given the inability to demonstrate a threshold or establish a safe level, it is appropriate that OSHA prescribe that the permissible exposure to benzene be reduced to the lowest level feasible." 43 Fed. Reg. 5932 (1978).

number of leukemias that could be expected to result from exposures at 10 ppm, at 1 ppm, or at any intermediate level, it nevertheless "determined that the benefits of the proposed standard are likely to be appreciable." [43] 43 Fed. Reg. 5941 (1978). In light of the Agency's disavowal of any ability to determine the numbers of employees likely to be adversely affected by exposures of 10 ppm, the Court of Appeals held this finding to be unsupported by the record. 581 F. 2d, at 503.[44]

It is noteworthy that at no point in its lengthy explanation did the Agency quote or even cite § 3 (8) of the Act. It made no finding that any of the provisions of the new standard were "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Nor did it allude to the possibility that any such finding might have been appropriate.

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[43] At an earlier point in its explanation, OSHA stated:

"There is general agreement that benzene exposure causes leukemia as well as other fatal diseases of the bloodforming organs. In spite of the certainty of this conclusion, there does not exist an adequate scientific basis for establishing the quantitative dose response relationship between exposure to benzene and the induction of leukemia and other blood diseases. The uncertainty in both the actual magnitude of expected deaths and in the theory of extrapolation from existing data to the OSHA exposure levels places the estimation of benefits on 'the frontiers of scientific knowledge.' While the actual estimation of the number of cancers to be prevented is highly uncertain, the evidence indicates that the number may be appreciable. There is general agreement that even in the absence of the ability to establish a 'threshold' or 'safe' level for benzene and other carcinogens, a dose response relationship is likely to exist; that is, exposure to higher doses carries with it a higher risk of cancer, and conversely, exposure to lower levels is accompanied by a reduced risk, even though a precise quantitative relationship cannot be established." *Id.*, at 5940.

[44] The court did, however, hold that the Agency's other conclusions—that there is *some* risk of leukemia at 10 ppm and that the risk would decrease by decreasing the exposure limit to 1 ppm—were supported by substantial evidence. 581 F. 2d, at 503.

III

Our resolution of the issues in these cases turns, to a large extent, on the meaning of and the relationship between § 3 (8), which defines a health and safety standard as a standard that is "reasonably necessary and appropriate to provide safe or healthful employment," and § 6 (b)(5), which directs the Secretary in promulgating a health and safety standard for toxic materials to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . ."

In the Government's view, § 3 (8)'s definition of the term "standard" has no legal significance or at best merely requires that a standard not be totally irrational. It takes the position that § 6 (b)(5) is controlling and that it requires OSHA to promulgate a standard that either gives an absolute assurance of safety for each and every worker or reduces exposures to the lowest level feasible. The Government interprets "feasible" as meaning technologically achievable at a cost that would not impair the viability of the industries subject to the regulation. The respondent industry representatives, on the other hand, argue that the Court of Appeals was correct in holding that the "reasonably necessary and appropriate" language of § 3 (8), along with the feasibility requirement of § 6 (b)(5), requires the Agency to quantify both the costs and the benefits of a proposed rule and to conclude that they are roughly commensurate.

In our view, it is not necessary to decide whether either the Government or industry is entirely correct. For we think it is clear that § 3 (8) does apply to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment. Only after the Secretary has made the threshold determination that such a risk exists

with respect to a toxic substance, would it be necessary to decide whether § 6 (b)(5) requires him to select the most protective standard he can consistent with economic and technological feasibility, or whether, as respondents argue, the benefits of the regulation must be commensurate with the costs of its implementation. Because the Secretary did not make the required threshold finding in these cases, we have no occasion to determine whether costs must be weighed against benefits in an appropriate case.

A

Under the Government's view, § 3 (8), if it has any substantive content at all,[45] merely requires OSHA to issue stand-

[45] We cannot accept the argument that § 3 (8) is totally meaningless. The Act authorizes the Secretary to promulgate three different kinds of standards—national consensus standards, permanent standards, and temporary emergency standards. The only substantive criteria given for two of these—national consensus standards and permanent standards for safety hazards not covered by § 6 (b)(5)—are set forth in § 3. While it is true that § 3 is entitled "definitions," that fact does not drain each definition of substantive content. For otherwise there would be no purpose in defining the critical terms of the statute. Moreover, if the definitions were ignored, there would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents. We may not expect Congress to display perfect craftsmanship, but it is unrealistic to assume that it intended to give no direction whatsoever to the Secretary in promulgating most of his standards.

The structure of the separate subsection describing emergency temporary standards, 29 U. S. C. § 655 (c), quoted in n. 13, *supra*, supports this conclusion. It authorizes the Secretary to bypass the normal procedures for setting permanent standards if he makes two findings: (A) that employees are exposed to "grave danger" from exposure to toxic substances and (B) that an emergency standard is "necessary" to protect the employees from that danger. Those findings are to be compared with those that are implicitly required by the definition of the permanent standard—(A) that there be a significant—as opposed to a "grave"—risk, and (B) that additional regulation is "reasonably necessary or appropriate"—as opposed to "necessary." It would be anomalous for Congress to require specific find-

ards that are reasonably calculated to produce a safer or more healthy work environment. Tr. of Oral Arg. 18, 20. Apart from this minimal requirement of rationality, the Government argues that § 3 (8) imposes no limits on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be "reasonably necessary" to eliminate all risks of any harm from their workplaces.[46] With respect to toxic substances and harmful physical agents, the Government takes an even more extreme position. Relying on § 6 (b)(5)'s direction to set a standard "which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," the Government contends that the Secretary is required to impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries.

If the purpose of the statute were to eliminate completely and with absolute certainty any risk of serious harm, we would agree that it would be proper for the Secretary to interpret §§ 3 (8) and 6 (b)(5) in this fashion. But we think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy an entire industry. Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm.

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ings for temporary standards but to give the Secretary a *carte blanche* for permanent standards.

[46] The Government does not concede that the feasibility requirement in the second sentence of § 6 (b)(5) applies to health and safety standards other than toxic substances standards. See n. 1, *supra*. However, even if it did, the Government's interpretation of the term "feasible," when coupled with its view of § 3 (8), would still allow the Agency to require the elimination of even insignificant risks at great cost, so long as an entire industry's viability would not be jeopardized.

B

By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

Therefore, before he can promulgate *any* permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6 (b)(5), as well as to other types of permanent standards. For there is no reason why § 3 (8)'s definition of a standard should not be deemed incorporated by reference into § 6 (b)(5). The standards promulgated pursuant to § 6 (b)(5) are just one species of the genus of standards governed by the basic requirement. That section repeatedly uses the term "standard" without suggesting any exception from, or qualification of, the general definition; on the contrary, it directs the Secretary to select "*the* standard"—that is to say, one of various possible alternatives that satisfy the basic definition in § 3 (8)—that is most protective.[47] Moreover, requiring the

[47] Section 6 (b)(5) parallels § 6 (a) in this respect. Section 6 (a) requires the Secretary, when faced with a choice between two national consensus standards, to choose the more protective standard, see n. 7, *supra*. Just as § 6 (a) does not suggest that this more protective standard need not meet the definition of a national consensus standard set forth in § 3 (9),

Secretary to make a threshold finding of significant risk is consistent with the scope of the regulatory power granted to him by § 6 (b)(5), which empowers the Secretary to promulgate standards, not for chemicals and physical agents generally, but for *"toxic* materials" and *"harmful* physical agents." [48]

This interpretation of §§ 3 (8) and 6 (b)(5) is supported by the other provisions of the Act. Thus, for example, § 6 (g) provides in part that

> "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades,

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so § 6 (b)(5) does not suggest that the most protective toxic material standard need not conform to the definition of a "standard" in § 3 (8).

[48] The rest of § 6 (b)(5), while requiring the Secretary to promulgate the standard that "most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," also contains phrases implying that the Secretary should consider differences in degrees of significance rather than simply a total elimination of all risks. Thus, the standard to be selected is one that "most adequately assures, to the extent feasible, on the basis of the best available evidence," that no such harm will result. The Secretary is also directed to take into account "research, demonstrations, experiments, and such other information as may be appropriate" and to consider "[i]n addition to the attainment of the highest degree of health and safety protection for the employee . . . the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws."

MR. JUSTICE MARSHALL states that our view of § 3 (8) would make the first sentence in § 6 (b)(5) superfluous. We disagree. The first sentence of § 6 (b)(5) requires the Secretary to select a highly protective standard once he has determined that a standard should be promulgated. The threshold finding that there is a need for such a standard in the sense that there is a significant risk in the workplace is not unlike the threshold finding that a chemical is toxic or a physical agent is harmful. Once the Secretary has made the requisite threshold finding, § 6 (b)(5) directs him to choose the most protective standard that still meets the definition of a standard under § 3 (8), consistent with feasibility.

crafts, occupations, businesses, workplaces or work environments."

The Government has expressly acknowledged that this section requires the Secretary to undertake some cost-benefit analysis before he promulgates any standard, requiring the elimination of the most serious hazards first.[49] If such an analysis must precede the promulgation of any standard, it seems manifest that Congress intended, at a bare minimum, that the Secretary find a significant risk of harm and therefore a probability of significant benefits before establishing a new standard.

Section 6 (b)(8) lends additional support to this analysis. That subsection requires that, when the Secretary substantially alters an existing consensus standard, he must explain how the new rule will "better effectuate" the purposes of the Act.[50] If this requirement was intended to be more than a meaningless formality, it must be read to impose upon the Secretary the duty to find that an existing national consensus standard is not adequate to protect workers from a continuing and significant risk of harm. Thus, in this case, the Secretary was required to find that exposures at the current permissible

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[49] "First, 29 U. S. C. § 655 (g) requires the Secretary to establish priorities in setting occupational health and safety standards so that the more serious hazards are addressed first. In setting such priorities the Secretary must, of course, consider the relative costs, benefits and risks." Reply Brief for Federal Parties 13. The Government argues that the Secretary's setting of priorities under this section is not subject to judicial review. Tr. of Oral Arg. 23. While we agree that a court cannot tell the Secretary which of two admittedly significant risks he should act to regulate first, this section, along with §§ 3 (8) and 6 (b)(5), indicates that the Act does limit the Secretary's power to requiring the elimination of significant risks.

[50] Section 6 (b)(8), as set forth in 29 U. S. C. § 655 (b)(8), provides:

"Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard."

exposure level of 10 ppm present a significant risk of harm in the workplace.

In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3 (8) and 6 (b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.[51]

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[51] OSHA's proposed generic cancer policy, 42 Fed. Reg. 54148 (1977), indicates that this possibility is not merely hypothetical. Under its proposal, whenever there is a certain quantum of proof—either from animal experiments, or, less frequently, from epidemiological studies—that a substance causes cancer at any exposure level, an emergency temporary standard would be promulgated immediately, requiring employers to provide monitoring and medical examinations and to reduce exposures to the lowest feasible level. A proposed rule would then be issued along the same lines, with objecting employers effectively foreclosed from presenting evidence that there is little or no risk associated with current exposure levels. *Id.*, at 54154–54155; 29 CFR, Part 1990 (1977).

The scope of the proposed regulation is indicated by the fact that NIOSH has published a list of 2,415 potential occupational carcinogens, NIOSH, Suspected Carcinogens: A Subfile of the Registry of Toxic Effects of Chemical Substances (HEW Pub. No. 77–149, 2d ed. 1976). OSHA has tentatively concluded that 269 of these substances have been proved to be carcinogens and therefore should be subject to full regulation. See OSHA Press Release, USDL 78–625 (July 14, 1978).

If the Government were correct in arguing that neither § 3 (8) nor § 6 (b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 539, and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

C

The legislative history also supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm. The examples of industrial hazards referred to in the Committee hearings and debates all involved situations in which the risk was unquestionably significant. For example, the Senate Committee on Labor and Public Welfare noted that byssinosis, a disabling lung disease caused by breathing cotton dust, affected as many as 30% of the workers in carding or spinning rooms in some American cotton mills and that as many as 100,000 active or retired workers were then suffering from the disease. It also noted that statistics indicated that 20,000 out of 50,000 workers who had performed insulation work were likely to die of asbestosis, lung cancer, or mesothelyioma as a result of breathing asbestos fibers. Another example given of an occupational health hazard that would be controlled by the Act was betanaphthylamine, a "chemical so toxic that any exposure at all is likely to cause the development of bladder cancer over a period of years." S. Rep. No. 91–1282, pp. 3–4 (1970); Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), pp. 143–144 (1971) (hereafter Leg. Hist.).

Moreover, Congress specifically amended § 6 (b)(5) to make

it perfectly clear that it does not require the Secretary to promulgate standards that would assure an absolutely risk-free workplace. Section 6 (b)(5) of the initial Committee bill provided that

> "[t]he Secretary, in promulgating standards under this subsection, shall set the standard which most adequately and feasibly assures, on the basis of the best available evidence, that no employee will suffer *any* impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." (Emphasis supplied.) S. 2193, 91st Cong., 2d Sess., p. 39 (1970), Leg. Hist. 242.

On the floor of the Senate, Senator Dominick questioned the wisdom of this provision, stating:

> "How in the world are we ever going to live up to that? What are we going to do about a place in Florida where mosquitoes are getting at the employee—perish the thought that there may be mosquitoes in Florida? But there are black flies in Minnesota and Wisconsin. Are we going to say that if employees get bitten by those for the rest of their lives they will not have been done any harm at all? Probably they will not be, but do we know?" 116 Cong. Rec. 36522 (1970), Leg. Hist. 345.

He then offered an amendment deleting the entire subsection.[52]

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[52] In criticizing the Committee bill, Senator Dominick also made the following observations:

"It is unrealistic to attempt, as this section apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility and it will only create confusion in the administration of this act for the Congress to set clearly unattainable goals." 116 Cong. Rec. 37614 (1970), Leg. Hist. 480.

"But I ask, Mr. President, just thinking about that language, let us take a fellow who is a streetcar conductor or a bus conductor at the present time. How in the world, in the process of the pollution we have in the streets

After discussions with the sponsors of the Committee bill, Senator Dominick revised his amendment. Instead of deleting the first sentence of § 6 (b)(5) entirely, his new amendment limited the application of that subsection to toxic materials and harmful physical agents and changed "any" impairment of health to "material" impairment.[53] In discussing this change, Senator Dominick noted that the Committee's bill read as if a standard had to "assure that, no matter what anybody was doing, the standard would protect him for the rest of his life against any foreseeable hazard." Such an "unrealistic standard," he stated, had not been intended by the sponsors of the bill. Rather, he explained that the intention of the bill, as implemented by the amendment, was to require the Secretary

> "to use his best efforts to promulgate the best available standards, and in so doing, . . . he should take into account that anyone working in toxic agents and physical

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or in the process of the automobile accidents that we have all during a working day of any one driving a bus or trolley car, or whatever it may be, can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for this to be put in a bill; and yet it is in the committee bill." 116 Cong. Rec., at 37337, Leg. Hist. 423.

As an opponent of the legislation, Senator Dominick may have exaggerated the significance of the problem since the language in § 3 (8) already was sufficient to prevent the Secretary from trying "to establish a utopia free from any hazards." Nevertheless, the fact that Congress amended the bill to allay Senator Dominick's concern demonstrates that it did not intend the statute to achieve "clearly unattainable goals."

[53] Senator Dominick had also been concerned that the placement of the word "feasibly" could be read to require the Secretary to "ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy," since the way to most "adequately" and "feasibly" assure absolute protection might well be to prohibit the occupation entirely. 116 Cong. Rec., at 36530, Leg. Hist. 366–367. In his final amendment, he attempted to cure this problem by relocating the feasibility requirement, changing "the standard which most adequately and feasibly assures" to "the standard which most adequately assures, to the extent feasible."

> agents which might be harmful may be subjected to such conditions for the rest of his working life, so that we can get at something which might not be toxic now, if he works in it a short time, but if he works in it the rest of his life might be very dangerous; and we want to make sure that such things are taken into consideration in establishing standards." 116 Cong. Rec., at 37622–37623, Leg. Hist. 502–503.[54]

Senator Williams, one of the sponsors of the Committee bill, agreed with the interpretation, and the amendment was adopted.

In their reply brief the federal parties argue that the Dominick amendment simply means that the Secretary is not required to eliminate threats of insignificant harm; they argue that § 6 (b)(5) still requires the Secretary to set standards that ensure that not even one employee will be subject to any risk of serious harm—no matter how small that risk may be.[55]

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[54] MR. JUSTICE MARSHALL argues that Congress could not have thought § 3 (8) had any substantive meaning inasmuch as § 6 (b)(5), as originally drafted, applied to all standards and not simply to standards for toxic materials and harmful physical substances. However, as this legislative history indicates, it appears that the omission of the words "toxic substances" and "harmful physical agents" from the original draft of § 6 (b)(5) was entirely inadvertent. As Senator Dominick noted, the Committee had always intended that subsection to apply only to that limited category of substances. The reason that Congress drafted a special section for these substances was not, as MR. JUSTICE MARSHALL suggests, because it thought that there was a need for special protection in these areas. Rather, it was because Congress recognized that there were special problems in regulating health risks as opposed to safety risks. In the latter case, the risks are generally immediate and obvious, while in the former, the risks may not be evident until a worker has been exposed for long periods of time to particular substances. It was to ensure that the Secretary took account of these long-term risks that Congress enacted § 6 (b)(5).

[55] Reply Brief for Federal Parties 24–26. While it is true that some of Senator Dominick's comments were concerned with the relative unimportance of minor injuries (see his "fly" example quoted *supra*, at 647), it is

This interpretation is at odds with Congress' express recognition of the futility of trying to make all workplaces totally risk-free. Moreover, not even OSHA follows this interpretation of § 6 (b)(5) to its logical conclusion. Thus, if OSHA is correct that the only no-risk level for leukemia due to benzene exposure is zero and if its interpretation of § 6 (b)(5) is correct, OSHA should have set the exposure limit as close to zero as feasible. But OSHA did not go about its task in that way. Rather, it began with a 1 ppm level, selected at least in part to ensure that employers would not be required to eliminate benzene concentrations that were little greater than the so-called "background" exposures experienced by the population at large. See n. 14, *supra*. Then, despite suggestions by some labor unions that it was feasible for at least some industries to reduce exposures to well below 1 ppm,[56] OSHA decided to apply the same limit to all, largely as a matter of administrative convenience. 43 Fed. Reg. 5947 (1978).

OSHA also deviated from its own interpretation of § 6 (b)(5) in adopting an action level of 0.5 ppm below which monitoring and medical examinations are not required. In light of OSHA's cancer policy, it must have assumed that some employees would be at risk because of exposures below 0.5 ppm. These employees would thus presumably benefit from medical examinations, which might uncover any benzene-related problems. OSHA's consultant advised the Agency that it was technologically and economically feasible to require that such examinations be provided. Nevertheless, OSHA adopted an action level, largely because the insignificant ben-

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clear that he was also concerned with the remote possibility of major injuries, see n. 52, *supra*.

[56] One union suggested a 0.5 ppm permissible exposure limit for oil refineries and a 1 ppm ceiling (rather than a time-weighted average) exposure for all other industries, with no use of an action level, Tr. 1250, 1257. Another wanted a 1 ppm ceiling limit for all industries, *id.*, at 3375–3376.

efits of giving such examinations and performing the necessary monitoring did not justify the substantial cost.[57]

OSHA's concessions to practicality in beginning with a 1 ppm exposure limit and using an action level concept implicitly adopt an interpretation of the statute as not requiring regulation of insignificant risks.[58] It is entirely consistent with this interpretation to hold that the Act also requires the Agency to limit its endeavors in the standard-setting area to eliminating significant risks of harm.

Finally, with respect to the legislative history, it is important to note that Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry. Thus, Congress refused to give the Secretary the power to shut down plants unilaterally because of an imminent danger, see *Whirlpool Corp.* v. *Marshall,* 445 U. S. 1, and narrowly circumscribed the Secretary's power to issue temporary emergency standards.[59] This effort by

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[57] "A need for an action level is also suggested by the record evidence that some minimal exposure to benzene occurs naturally from animal and plant matter (Tr. 749–750; 759–760). Naturally occurring benzene concentrations, it appears, may range from 0.02 to 15 parts per billion (Ex. 117, p. 1). Additionally, it was suggested by certain employers that their operations be exempted from the requirements of the standard because these operations involve only intermittent and low level exposures to benzene. The use of the action level concept should accommodate these concerns in all cases where exposures are indeed extremely low since it substantially reduces the monitoring of employees who are below the action level and removes for these employees the requirements for medical surveillance. At the same time, employees with *significant* overexposure are afforded the full protection of the standard." (Emphasis added.) 43 Fed. Reg. 5942 (1978).

[58] The Government also states that it is OSHA's policy to attempt to quantify benefits wherever possible. While this is certainly a reasonable position, it is not consistent with OSHA's own view of its duty under § 6 (b)(5). In light of the inconsistencies in OSHA's position and the legislative history of the Act, we decline to defer to the Agency's interpretation.

[59] In *Florida Peach Growers Assn., Inc.* v. *U. S. Dept. of Labor,* 489 F. 2d 120, 130, and n. 16 (CA5 1974), the court noted that Congress intended

Congress to limit the Secretary's power is not consistent with a view that the mere possibility that some employee somewhere in the country may confront some risk of cancer is a sufficient basis for the exercise of the Secretary's power to require the expenditure of hundreds of millions of dollars to minimize that risk.

D

Given the conclusion that the Act empowers the Secretary to promulgate health and safety standards only where a significant risk of harm exists, the critical issue becomes how to define and allocate the burden of proving the significance of the risk in a case such as this, where scientific knowledge is imperfect and the precise quantification of risks is therefore impossible. The Agency's position is that there is substantial evidence in the record to support its conclusion that there is no absolutely safe level for a carcinogen and that, therefore, the burden is properly on industry to prove, apparently beyond a shadow of a doubt, that there *is* a safe level for benzene exposure. The Agency argues that, because of the uncertainties in this area, any other approach would render it helpless, forcing it to wait for the leukemia deaths that it believes are likely to occur [60] before taking any regulatory action.

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to restrict the use of emergency standards, which are promulgated without any notice or hearing. It held that, in promulgating an emergency standard, OSHA must find not only a danger *of* exposure or even some danger *from* exposure, but also a grave danger from exposure necessitating emergency action. Accord, *Dry Color Mfrs. Assn., Inc.* v. *U. S. Dept. of Labor*, 486 F. 2d 98, 100 (CA3 1973) (an emergency standard must be supported by something more than a possibility that a substance may cause cancer in man).

Congress also carefully circumscribed the Secretary's enforcement powers by creating a new, independent board to handle appeals from citations issued by the Secretary for noncompliance with health and safety standards. See 29 U. S. C. §§ 659–661.

[60] As noted above, OSHA acknowledged that there was no empirical evidence to support the conclusion that there was any risk whatsoever of deaths due to exposures at 10 ppm. What OSHA relied upon was a theory

We disagree. As we read the statute, the burden was on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment. Ordinarily, it is the proponent of a rule or order who has the burden of proof in administrative proceedings. See 5 U. S. C. § 556 (d). In some cases involving toxic substances, Congress has shifted the burden of proving that a particular substance is safe onto the party opposing the proposed rule.[61] The fact that Congress did not follow this course in enacting the Occupational Safety and Health Act indicates that it intended the Agency to bear the normal burden of establishing the need for a proposed standard.

In this case OSHA did not even attempt to carry its burden of proof. The closest it came to making a finding that benzene presented a significant risk of harm in the workplace was its statement that the benefits to be derived from lowering the permissible exposure level from 10 to 1 ppm were "likely" to be "appreciable." The Court of Appeals held that this finding was not supported by substantial evidence. Of greater importance, even if it were supported by substantial evidence, such a finding would not be sufficient to satisfy the Agency's obligations under the Act.

The inadequacy of the Agency's findings can perhaps be

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that, because leukemia deaths had occurred at much higher exposures, some (although fewer) were also likely to occur at relatively low exposures. The Court of Appeals specifically held that its conclusion that the number was "likely" to be appreciable was unsupported by the record. See *supra*, at 638.

[61] See *Environmental Defense Fund, Inc.* v. *EPA*, 179 U. S. App. D. C. 43, 49, 57–63, 548 F. 2d 998, 1004, 1012–1018 (1977), cert. denied, 431 U. S. 925, where the court rejected the argument that the EPA has the burden of proving that a pesticide is unsafe in order to suspend its registration under the Federal Insecticide, Fungicide, and Rodenticide Act. The court noted that Congress had deliberately shifted the ordinary burden of proof under the Administrative Procedure Act, requiring manufacturers to establish the continued safety of their products.

illustrated best by its rejection of industry testimony that a dose-response curve can be formulated on the basis of current epidemiological evidence and that, even under the most conservative extrapolation theory, current exposure levels would cause at most two deaths out of a population of about 30,000 workers every six years. See n. 38, *supra*. In rejecting this testimony, OSHA made the following statement:

> "In the face of the record evidence of numerous actual deaths attributable to benzene-induced leukemia and other fatal blood diseases, OSHA is unwilling to rely on the hypothesis that at most two cancers every six years would be prevented by the proposed standard. By way of example, the Infante study disclosed seven excess leukemia deaths in a population of about 600 people over a 25-year period. While the Infante study involved higher exposures then those currently encountered, the incidence rates found by Infante, together with the numerous other cases reported in the literature of benzene leukemia and other fatal blood diseases, make it difficult for OSHA to rely on the [witness'] hypothesis to assure the statutorily mandated protection of employees. In any event, due to the fact that there is no safe level of exposure to benzene and that it is impossible to precisely quantify the anticipated benefits, OSHA must select the level of exposure which is most protective of exposed employees." 43 Fed. Reg. 5941 (1978).

There are three possible interpretations of OSHA's stated reason for rejecting the witness' testimony: (1) OSHA considered it probable that a greater number of lives would be saved by lowering the standard from 10 ppm; (2) OSHA thought that saving two lives every six years in a work force of 30,000 persons is a significant savings that makes it reasonable and appropriate to adopt a new standard; or (3) even if the small number is not significant and even if the savings may be even smaller, the Agency nevertheless believed it had

a statutory duty to select the level of exposure that is most protective of the exposed employees if it is economically and technologically feasible to do so. Even if the Secretary did not intend to rely entirely on this third theory, his construction of the statute would make it proper for him to do so. Moreover, he made no express findings of fact that would support his 1 ppm standard on any less drastic theory. Under these circumstances, we can hardly agree with the Government that OSHA discharged its duty under the Act.

Contrary to the Government's contentions, imposing a burden on the Agency of demonstrating a significant risk of harm will not strip it of its ability to regulate carcinogens, nor will it require the Agency to wait for deaths to occur before taking any action. First, the requirement that a "significant" risk be identified is not a mathematical straitjacket. It is the Agency's responsibility to determine, in the first instance, what it considers to be a "significant" risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it. Although the Agency has no duty to calculate the exact probability of harm, it does have an obligation to find that a significant risk is present before it can characterize a place of employment as "unsafe." [62]

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[62] In his dissenting opinion, *post*, at 706, MR. JUSTICE MARSHALL states: "[W]hen the question involves determination of the acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of

Second, OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty. Although the Agency's findings must be supported by substantial evidence, 29 U. S. C. § 655 (f), § 6 (b)(5) specifically allows the Secretary to regulate on the basis of the "best available evidence." As several Courts of Appeals have held, this provision requires a reviewing court to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge. See *Industrial Union Dept., AFL–CIO* v. *Hodgson*, 162 U. S. App. D. C. 331, 340, 499 F. 2d 467, 476 (1974); *Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F. 2d 1301, 1308 (CA2 1975), cert. denied, 421 U. S. 992. Thus, so long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection.[63]

Finally, the record in this case and OSHA's own rulings on other carcinogens indicate that there are a number of ways in which the Agency can make a rational judgment about the

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the facts." We agree. Thus, while the Agency must support its finding that a certain level of risk exists by substantial evidence, we recognize that its determination that a particular level of risk is "significant" will be based largely on policy considerations. At this point we have no need to reach the issue of what level of scrutiny a reviewing court should apply to the latter type of determination.

[63] MR. JUSTICE MARSHALL states that, under our approach, the Agency must either wait for deaths to occur or must "deceive the public" by making a basically meaningless determination of significance based on totally inadequate evidence. MR. JUSTICE MARSHALL's view, however, rests on the erroneous premise that the only reason OSHA did not attempt to quantify benefits in this case was because it could not do so in any reasonable manner. As the discussion of the Agency's rejection of an industry attempt at formulating a dose-response curve demonstrates, however, see *supra*, at 653–655, the Agency's rejection of methods such as dose-response curves was based at least in part on its view that nothing less than absolute safety would suffice.

relative significance of the risks associated with exposure to a particular carcinogen.[64]

It should also be noted that, in setting a permissible exposure level in reliance on less-than-perfect methods, OSHA would have the benefit of a backstop in the form of monitor-

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[64] For example, in the coke-oven emissions standard, OSHA had calculated that 21,000 exposed coke-oven workers had an annual excess mortality of over 200 and that the proposed standard might well eliminate the risk entirely. 41 Fed. Reg. 46742, 46750 (1976), upheld in *American Iron & Steel Inst.* v. *OSHA*, 577 F. 2d 825 (CA3 1978), cert. granted, *post*, p. 909. In hearings on the coke-oven emissions standard, the Council on Wage and Price Stability estimated that 8 to 35 lives would be saved each year, out of an estimated population of 14,000 workers, as a result of the proposed standard. Although noting that the range of benefits would vary depending on the assumptions used, OSHA did not make a finding as to whether its own staff estimate or CWPS's was correct, on the ground that it was not required to quantify the expected benefits of the standard or to weigh those benefits against the projected costs.

In other proceedings, the Agency has had a good deal of data from animal experiments on which it could base a conclusion on the significance of the risk. For example, the record on the vinyl chloride standard indicated that a significant number of animals had developed tumors of the liver, lung, and skin when they were exposed to 50 ppm of vinyl chloride over a period of 11 months. One hundred out of 200 animals died during that period. 39 Fed. Reg. 35890, 35891 (1974). Similarly, in a 1974 standard regulating 14 carcinogens, OSHA found that one of the substances had caused lung cancer in mice or rats at 1 ppm and even 0.1 ppm, while another had caused tumors in 80% of the animals subjected to high doses. *Id.*, at 3756, 3757, upheld in *Synthetic Organic Chemical Mfrs. Assn.* v. *Brennan*, 503 F. 2d 1155 (CA3 1974), cert. denied, 420 U. S. 973, and *Synthetic Organic Chemical Mfrs. Assn.* v. *Brennan*, 506 F. 2d 385 (CA3 1974), cert. denied, 423 U. S. 830.

In this case the Agency did not have the benefit of animal studies, because scientists have been unable as yet to induce leukemia in experimental animals as a result of benzene exposure. It did, however, have a fair amount of epidemiological evidence, including both positive and negative studies. Although the Agency stated that this evidence was insufficient to construct a precise correlation between exposure levels and cancer risks, it would at least be helpful in determining whether it is more likely than not that there is a significant risk at 10 ppm.

ing and medical testing. Thus, if OSHA properly determined that the permissible exposure limit should be set at 5 ppm, it could still require monitoring and medical testing for employees exposed to lower levels.[65] By doing so, it could keep a constant check on the validity of the assumptions made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if it was initially set too high.[66] Moreover, in this way it could ensure that workers who were unusually susceptible to benzene could be removed from exposure before they had suffered any permanent damage.[67]

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Because our review of these cases has involved a more detailed examination of the record than is customary, it must

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[65] See *GAF Corp.* v. *Occupational Safety and Health Review Comm'n*, 183 U. S. App. D. C. 20, 561 F. 2d 913 (1977), where the court upheld the asbestos standard insofar as it required employers to provide medical examinations for employees exposed to any asbestos fibers, even if they were exposed to concentrations below the permissible exposure limit.

The respondent industry representatives have never disputed OSHA's power to require monitoring and medical examinations in general, although they did object to some of the specific requirements imposed in this case. See n. 30, *supra*. Because of our disposition of the case, we have no occasion to pass on these specific objections or to determine what cost-benefit considerations, if any, should govern the Agency's imposition of such requirements.

[66] This is precisely the type of information-gathering function that Congress had in mind when it enacted § 6 (b) (7), which empowers the Secretary to require medical examinations to be furnished to employees exposed to certain hazards and potential hazards "in order to most effectively determine whether the health of such employees is adversely affected by such exposure." See S. Rep. No. 91–1282, p. 7 (1970), Leg. Hist. 147.

[67] In its explanation of the final standard OSHA noted that there was some testimony that blood abnormalities would disappear after exposure had ceased. 43 Fed. Reg. 5946 (1978). Again, however, OSHA refused to rely on the hypothesis that this would always occur. Yet, in requiring medical examinations of employees exposed to between 0.5 ppm and 1 ppm, OSHA was essentially providing itself with the same kind of backstop.

be emphasized that we have neither made any factual determinations of our own, nor have we rejected any factual findings made by the Secretary. We express no opinion on what factual findings this record might support, either on the basis of empirical evidence or on the basis of expert testimony; nor do we express any opinion on the more difficult question of what factual determinations would warrant a conclusion that significant risks are present which make promulgation of a new standard reasonably necessary or appropriate. The standard must, of course, be supported by the findings actually made by the Secretary, not merely by findings that we believe he might have made.

In this case the record makes it perfectly clear that the Secretary relied squarely on a special policy for carcinogens that imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding the Secretary's threshold responsibility of establishing the need for more stringent standards. In so interpreting his statutory authority, the Secretary exceeded his power.

IV

Throughout the administrative proceedings, the dermal contact issue received relatively little attention. In its proposed rule OSHA recommended a total ban on skin and eye contact with liquid benzene on the basis of its policy that "in dealing with a carcinogen, all potential routes of exposure (i. e., inhalation, ingestion, and skin absorption) [should] be limited to the extent feasible." 43 Fed. Reg. 5948 (1978). There was little opposition to this requirement at the hearing on the proposed rule, apparently because the proposed rule also excluded from both the permissible exposure level and the dermal contact ban work operations involving liquid mixtures containing 1% (and after one year, 0.1%) or less benzene.

In its final standard, however, OSHA eliminated the percentage exclusion for liquid benzene, on the ground that there was no predictable correlation between the percentage of ben-

zene in a liquid and the airborne exposure arising from it. See n. 22, *supra*. Although the extent to which liquid benzene is absorbed through the skin is concededly unknown, OSHA also refused to exempt any liquids, no matter how little benzene they contained, from the ban on dermal contact. In support of this position it stated that there was no evidence to "suggest that the absorption rate depends on the amount of benzene present in the liquid." 43 Fed. Reg. 5948–5949 (1978).

After the permanent standard was promulgated, OSHA received a number of requests from various industries that the percentage exclusion for liquids containing small amounts of benzene be reinstated. Those concerned with airborne exposures argued that they should not be required to monitor workplaces simply because they handled petroleum-based products in which benzene is an unavoidable contaminant. Others concerned with the dermal contact ban made similar arguments. In particular, tire manufacturers argued that it was impossible for them to comply with the ban because gloves cannot be worn during certain tire-building operations in which solvents are used and solvents containing absolutely no benzene are not commercially available.

Because of these requests, OSHA held a new series of hearings and promulgated an amendment to the rule, reinstating the percentage exclusion, but lowering it from the proposed 1% to 0.5%. The Agency did, however, provide for a 3-year grace period before the exclusion dropped to 0.1%, rather than the one year that had originally been proposed. In explaining its amendment, OSHA reiterated its policy with respect to carcinogens, stating that, because there is no absolutely safe level for any type of exposure, exposures by whatever route must be limited to the extent feasible. For airborne exposures, a zero permissible exposure limit had not been feasible. However, in most industries a ban on any dermal contact was feasible since compliance could be achieved simply by the use of protective clothing, such as impermeable

gloves. The Agency recognized that the dermal contact ban could present a problem for tire manufacturers, but stated that the percentage exclusion would alleviate the problem, because solvents containing 0.5% or less benzene were available in sufficient quantities. Although it noted that solvents containing 0.1% or less benzene were not then available in quantity, the Agency stated that a 3-year grace period would be sufficient to "allow time for increased production of solvents containing lower amounts of benzene and for development and evaluation of alternative methods of compliance with the standard's dermal provision." *Id.*, at 27968–27969.

The Court of Appeals struck down the dermal contact prohibition on two grounds. First, it held that the record did not support a finding that the ban would result in quantifiable benefits in terms of a reduced leukemia risk; therefore, it was not "reasonably necessary" within the meaning of § 3 (8) of the Act. Second, the court held that the Agency's conclusion that benzene may be absorbed through the skin was not based on the best available evidence as required by § 6 (b)(5). 581 F. 2d, at 505–506. On the second ground, the court noted that the evidence on the issue of absorption of benzene through the skin was equivocal, with some studies indicating that it could be absorbed and some indicating that it could not. All of these studies were relatively old and the only expert who had testified on the issue stated that a simple test was now available to determine, with a great deal of accuracy, whether and to what extent absorption will result. In light of § 6 (b)(5), which requires the Agency to promulgate standards on the basis of the "best available evidence" and "the latest available scientific data in the field," the court held that where there is uncontradicted testimony that a simple test will resolve the issue, the Agency is required to acquire that information before "promulgating regulations which would require an established industry to change long-followed work processes that are not demonstrably unsafe." 581 F. 2d, at 508.

While the court below may have been correct in holding that, under the peculiar circumstances of this case, OSHA was required to obtain more information, there is no need for us to reach that issue. For, in order to justify a ban on dermal contact, the Agency must find that such a ban is "reasonably necessary and appropriate" to remove a significant risk of harm from such contact. The Agency did not make such a finding, but rather acted on the basis of the absolute, no-risk policy that it applies to carcinogens. Indeed, on this issue the Agency's position is even more untenable, inasmuch as it was required to assume not only that benzene in small doses is a carcinogen, but also that it can be absorbed through the skin in sufficient amounts to present a carcinogenic risk. These assumptions are not a proper substitute for the findings of a significant risk of harm required by the Act.

The judgment of the Court of Appeals remanding the petition for review to the Secretary for further proceedings is affirmed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

These cases press upon the Court difficult unanswered questions on the frontiers of science and medicine. The statute and the legislative history give ambiguous signals as to how the Secretary is directed to operate in this area. The opinion by MR. JUSTICE STEVENS takes on a difficult task to decode the message of the statute as to guidelines for administrative action.

To comply with statutory requirements, the Secretary must bear the burden of "finding" that a proposed health and safety standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This policy judgment entails the subsidiary finding that the pre-existing standard presents a "significant risk" of material health impairment for a worker who spends his entire employment life in a working environment where ex-

posure remains at maximum permissible levels. The Secretary's factual finding of "risk" must be "quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way." *Ante*, at 646. Precisely what this means is difficult to say. But because these mandated findings were not made by the Secretary, I agree that the 1 ppm benzene standard must be invalidated. However, I would stress the differing functions of the courts and the administrative agency with respect to such health and safety regulation.

The Congress is the ultimate regulator, and the narrow function of the courts is to discern the meaning of the statute and the implementing regulations with the objective of ensuring that in promulgating health and safety standards the Secretary "has given reasoned consideration to each of the pertinent factors" and has complied with statutory commands. *Permian Basin Area Rate Cases*, 390 U. S. 747, 792 (1968). Our holding that the Secretary must retrace his steps with greater care and consideration is not to be taken in derogation of the scope of legitimate agency discretion. When the facts and arguments have been presented and duly considered, the Secretary must make a policy judgment as to whether a specific risk of health impairment is significant in terms of the policy objectives of the statute. When he acts in this capacity, pursuant to the legislative authority delegated by Congress, he exercises the prerogatives of the legislature—to focus on only one aspect of a larger problem, or to promulgate regulations that, to some, may appear as imprudent policy or inefficient allocation of resources. The judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation—although to be sure the boundaries are often ill-defined and indistinct.

Nevertheless, when discharging his duties under the statute, the Secretary is well admonished to remember that a heavy responsibility burdens his authority. Inherent in this statutory scheme is authority to refrain from regulation of

insignificant or *de minimis* risks. See *Alabama Power Co.* v. *Costle*, 204 U. S. App. D. C. 51, 88–89, 636 F. 2d 323, 360–361 (1979) (opinion of Leventhal, J.). When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join Parts I, II, III–A, III–B, III–C, and III–E of the plurality opinion.[1] The Occupational Safety and Health Administration relied in large part on its "carcinogen policy"—which had not been adopted formally—in promulgating the benzene exposure and dermal contact regulation at issue in these cases.[2] For the reasons stated by the plurality, I agree that §§ 6 (b)(5) and 3 (8) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 655 (b)(5) and 652 (8), must be read together. They require OSHA to make a threshold finding that proposed occupational health standards are reasonably necessary to provide safe workplaces. When OSHA acts to reduce existing national consensus standards,

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[1] These portions of the plurality opinion primarily address OSHA's special carcinogen policy, rather than OSHA's argument that it also made evidentiary findings. I do not necessarily agree with every observation in the plurality opinion concerning the presence or absence of such findings. I also express no view on the question whether a different interpretation of the statute would violate the nondelegation doctrine of *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). See *post*, at 672–687 (REHNQUIST, J., concurring in judgment).

[2] The Secretary of Labor promulgated the relevant standard pursuant to his statutory authority. Since OSHA is the agency responsible for developing such regulations under the Secretary's direction, this opinion refers to "OSHA" or "the agency" as the decisionmaker most directly concerned.

therefore, it must find that (i) currently permissible exposure levels create a significant risk of material health impairment; and (ii) a reduction of those levels would significantly reduce the hazard.

Although I would not rule out the possibility that the necessary findings could rest in part on generic policies properly adopted by OSHA, see McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 754–759 (1979), no properly supported agency policies are before us in these cases.[3] I therefore agree with the plurality that the regulation is invalid to the extent it rests upon the assumption that exposure to known carcinogens always should be reduced to a level proved to be safe or, if no such level is found, to the lowest level that the affected industry can achieve with available technology.

I

If the disputed regulation were based exclusively on this "carcinogen policy," I also would agree that we need not consider whether the Act requires OSHA to determine that the benefits of a proposed standard are reasonably related to the costs of compliance. *Ante*, at 615. As the Court of Appeals for the Fifth Circuit recognized, however, OSHA takes the "fall-back position" that its regulation is justified by specific findings based upon the voluminous evidentiary record compiled in this case. *American Petroleum Institute* v. *OSHA*, 581 F. 2d 493, 503. OSHA found, for example, that the num-

[3] OSHA has adopted a formal policy for regulating carcinogens effective April 21, 1980. 45 Fed. Reg. 5282 (1980) (to be codified at 29 CFR, Part 1990). But no such policy was in effect when the agency promulgated its benzene regulation. Moreover, neither the factual determinations nor the administrative judgments upon which the policy rests are supported adequately on this record alone. Accordingly, we have no occasion to consider the extent to which valid agency policies may supply a basis for a finding that health risks exist in particular cases.

ber of cancers prevented by reducing permissible exposure levels from 10 ppm to 1 ppm "may be appreciable," that "the benefits of the proposed standard are likely to be appreciable," and that the "substantial costs [of the new standard] are justified in light of the hazards." 43 Fed. Reg. 5940–5941 (1978). Thus, OSHA found—at least generally—that the hazards of benzene exposure at currently permissible levels are serious enough to justify an expenditure of hundreds of millions of dollars. For me, that finding necessarily subsumes the conclusion that the health risk is "significant." If OSHA's conclusion is supported by substantial evidence, the threshold requirement discussed in the plurality opinion would be satisfied.

As I read its opinion, the plurality does not consider whether the agency's findings are supported by substantial evidence. The Court of Appeals found them insufficient because OSHA failed "to estimate the extent of expected benefits. . . ." 581 F. 2d, at 504. That court apparently would have required OSHA to supply a specific numerical estimate of benefits derived through mathematical techniques for "risk quantification" or "cost-effectiveness analysis." *Id.*, at 504, n. 23; see *id.*, at 504–505. I do not agree with the Court of Appeals' conclusion that the statute requires quantification of risk in every case.

The statutory preference for the "best available evidence," 29 U. S. C. § 655 (b)(5), implies that OSHA must use the best known techniques for the accurate estimation of risks and benefits when such techniques are available. But neither the statute nor the legislative history suggests that OSHA's hands are tied when reasonable quantification cannot be accomplished by any known methods. See *post*, at 693 (MARSHALL, J., dissenting). In this litigation, OSHA found that "it is impossible to precisely quantify the anticipated benefits. . . ." 43 Fed. Reg. 5941 (1978). If this finding is supported by substantial evidence, the statute does not prevent the Secretary from finding a significant health hazard on the

basis of the weight of expert testimony and opinion. I do not understand the plurality to hold otherwise. See *ante*, at 662.

For the foregoing reasons, I would not hold that "OSHA did not even attempt to carry its burden of proof" on the threshold question whether exposure to benzene at 10 ppm presents a significant risk to human health. *Ante*, at 653. In my view, the question is whether OSHA successfully carried its burden on the basis of record evidence. That question in turn reduces to two principal issues. First, is there substantial evidence supporting OSHA's determination that available quantification techniques are too imprecise to permit a reasonable numerical estimate of risks? If not, then OSHA has failed to show that its regulation rests on the "best available evidence." Second, is OSHA's finding of significant risks at current exposure levels supported by substantial evidence? If not, then OSHA has failed to show that the new regulation is reasonably necessary to provide safe and healthful workplaces.

II

Although I regard the question as close, I do not disagree with the plurality's view that OSHA has failed, on this record, to carry its burden of proof on the threshold issues summarized above. But even if one assumes that OSHA properly met this burden, see *post*, at 697–701, 713–714 (MARSHALL, J., dissenting), I conclude that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits. An occupational health standard is neither "reasonably necessary" nor "feasible," as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.

OSHA contends that § 6 (b)(5) not only permits but actually requires it to promulgate standards that reduce health risks without regard to economic effects, unless those effects

would cause widespread dislocation throughout an entire industry.[4] Under the threshold test adopted by the plurality today, this authority will exist only with respect to "significant" risks. But the plurality does not reject OSHA's claim that it must reduce such risks without considering economic consequences less serious than massive dislocation. In my view, that claim is untenable.

Although one might wish that Congress had spoken with greater clarity, the legislative history and purposes of the statute do not support OSHA's interpretation of the Act.[5]

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[4] OSHA argues that § 6 (b)(5) requires it to promulgate standards that are "feasible" only in the sense that they are "capable of achievement"; that is, achievable "at bearable cost with available technology." Brief for Federal Parties 57. The lower courts have indicated that a standard is not "infeasible" under OSHA's test unless it would precipitate "massive economic dislocation" in the affected industry. See, *e. g.*, *American Federation of Labor* v. *Brennan*, 530 F. 2d 109, 123 (CA3 1975). In this case, OSHA simply asked a consulting firm to ascertain the costs of complying with a 1 ppm standard. See *ante*, at 621. OSHA then concluded that "the economic impact of [compliance] will not . . . threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978). The cost of complying with a standard may be "bearable" and still not reasonably related to the benefits expected. A manufacturing company, for example, may have financial resources that enable it to pay the OSHA-ordered costs. But expenditures for unproductive purposes may limit seriously its financial ability to remain competitive and provide jobs.

[5] I will not repeat the detailed summary of the legislative history contained in the plurality opinion. *Ante*, at 646–652. Many of the considerations that the plurality relies upon to show Congress' concern with significant harms persuade me that Congress did not intend OSHA to reduce each significant hazard without regard to economic consequences. Senator Williams, a sponsor of the legislation, stated: "Our bill is fair and reasonable. It is a good-faith effort to balance the need of workers to have a sa[f]e and healthy work environment against the requirement of industry to function without undue interference." 116 Cong. Rec. 37342 (1970), Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. 435 (1971). There could be no such "balance" if OSHA were

It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries—or significant segments thereof—is threatened. As the plurality observes, OSHA itself has not chosen to carry out such a self-defeating policy in all instances. *Ante*, at 650. If it did, OSHA regulations would impair the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers.[6]

I therefore would not lightly assume that Congress intended OSHA to require reduction of health risks found to be significant *whenever* it also finds that the affected indus-

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authorized to impose standards without regard to economic consequences short of serious dislocation.

Senator Dominick described a preliminary version of § 6 (b)(5) as follows:

"What we were trying to do in the bill . . . was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are *feasible and practical* to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone [*sic*] would be assured that no one would have a hazard. . . .

"It was an unrealistic standard. . . ." 116 Cong. Rec. 37622 (1970), Legislative History, *supra*, at 502 (emphasis added).

Senator Dominick's objection to the "unrealistic" standard of the forerunner of § 6 (b)(5) does not imply that he thought § 3 (8) of the Act lacked substantive content. See *post*, at 710–711 (MARSHALL, J., dissenting). The Senator hardly would have proposed that § 6 (b)(5) be deleted entirely, see *ante*, at 647, if he had not thought that other sections of the Act required health regulations that were reasonable and practical.

[6] Congress has assigned OSHA an extremely difficult and complex task, and the guidance afforded OSHA is considerably less than clear. The agency's primary responsibility, reflected in its title, is to minimize health and safety risks in the workplace. Yet the economic health of our highly industrialized society requires a high rate of employment and an adequate response to increasingly vigorous foreign competition. There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy.

try can bear the costs. See n. 4, *supra*. Perhaps more significantly, however, OSHA's interpretation of § 6 (b)(5) would force it to regulate in a manner inconsistent with the important health and safety purposes of the legislation we construe today. Thousands of toxic substances present risks that fairly could be characterized as "significant." Cf. *ante*, at 645, n. 51. Even if OSHA succeeded in selecting the gravest risks for earliest regulation, a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost.[7] I would not attribute such an irrational intention to Congress.

In these cases, OSHA did find that the "substantial costs" of the benzene regulations are justified. See *supra*, at 665–666. But the record before us contains neither adequate documentation of this conclusion, nor any evidence that OSHA weighed the relevant considerations. The agency simply announced its finding of cost-justification without explaining the method by which it determines that the benefits justify the costs and their economic effects. No rational system of regulation can permit its administrators to make policy judgments without explaining how their decisions effectuate the purposes of the governing law, and nothing in the statute authorizes such laxity in these cases.[8] Since neither the air-

[7] For example, OSHA's reading of § 6 (b)(5) could force the depletion of an industry's resources in an effort to reduce a single risk by some speculative amount, even though other significant risks remain unregulated.

[8] The decision that costs justify benefits is largely a policy judgment delegated to OSHA by Congress. When a court reviews such judgments under the "substantial evidence" standard mandated by 29 U. S. C. § 655 (f), the court must determine whether the responsible agency has "careful[ly] identifi[ed] . . . the reasons why [it] chooses to follow one course rather than another" as the most reasonable method of effectuating the purposes of the applicable law. *Industrial Union Dept.* v. *Hodgson*, 162 U. S. App. D. C. 331, 339–340, 499 F. 2d 467, 475–476 (1974). Since OSHA failed to identify its reasons in these cases, I express no

borne concentration standard nor the dermal contact standard for exposure to benzene satisfies the requirements of the governing statute, I join the Court's judgment affirming the judgment of the Court of Appeals.

MR. JUSTICE REHNQUIST, concurring in the judgment.

The statutory provision at the center of the present controversy, § 6 (b)(5) of the Occupational Safety and Health Act of 1970, states, in relevant part, that the Secretary of Labor

> ". . . in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 84 Stat. 1594, 29 U. S. C. § 655 (b)(5) (emphasis added).

According to the Secretary, who is one of the petitioners herein, § 6 (b)(5) imposes upon him an absolute duty, in regulating harmful substances like benzene for which no safe level is known, to set the standard for permissible exposure at the lowest level that "can be achieved at bearable cost with available technology." Brief for Federal Parties 57. While the Secretary does not attempt to refine the concept of "bearable cost," he apparently believes that a proposed standard is economically feasible so long as its impact "will not be such as to threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978).

Respondents reply, and the lower court agreed, that § 6 (b)(5) must be read in light of another provision in the

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opinion as to the standard of review that may be appropriate in other situations.

same Act, § 3 (8), which defines an "occupational health and safety standard" as

> ". . . a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 84 Stat. 1591, 29 U. S. C. § 652 (8).

According to respondents, § 6 (b)(5), as tempered by § 3 (8), requires the Secretary to demonstrate that any particular health standard is justifiable on the basis of a rough balancing of costs and benefits.

In considering these alternative interpretations, my colleagues manifest a good deal of uncertainty, and ultimately divide over whether the Secretary produced sufficient evidence that the proposed standard for benzene will result in any appreciable benefits at all. This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of MR. JUSTICE STEVENS, THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE MARSHALL demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.

I

In his Second Treatise of Civil Government, published in 1690, John Locke wrote that "[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive

grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands."[1] Two hundred years later, this Court expressly recognized the existence of and the necessity for limits on Congress' ability to delegate its authority to representatives of the Executive Branch: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U. S. 649, 692 (1892).[2]

The rule against delegation of legislative power is not, however, so cardinal a principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin. James Madison, in Federalist Paper No. 48, for example, recognized that while the division of authority among the various branches of government was a useful principle, "the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48, p. 308 (H. Lodge ed. 1888).

This Court also has recognized that a hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government

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[1] J. Locke, Second Treatise of Civil Government, in the Tradition of Freedom, ¶ 141, p. 244 (M. Mayer ed. 1957). In the same treatise, Locke also wrote that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." *Ibid.*

[2] As early as 1812, this Court had considered and rejected an argument that a statute authorizing the President to terminate a trade embargo on Britain and France if those two nations ceased violating "the neutral commerce of the United States" delegated too much discretion to the Executive Branch. See *The Brig Aurora* v. *United States*, 7 Cranch 382, 383, 386, 388.

capable of effectively exercising the substantive powers granted to the various branches by the Constitution. Mr. Chief Justice Taft, writing for the Court in *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394 (1928), noted the practicalities of the balance that has to be struck:

> "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.*, at 406.

During the third and fourth decades of this century, this Court within a relatively short period of time struck down several Acts of Congress on the grounds that they exceeded the authority of Congress under the Commerce Clause or under the nondelegation principle of separation of powers, and at the same time struck down state statutes because they violated "substantive" due process or interfered with interstate commerce. See generally R. Jackson, The Struggle for Judicial Supremacy 48–123 (1949). When many of these decisions were later overruled, the principle that Congress

could not simply transfer its legislative authority to the Executive fell under a cloud. Yet in my opinion decisions such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), suffer from none of the excesses of judicial policymaking that plagued some of the other decisions of that era. The many later decisions that have upheld congressional delegations of authority to the Executive Branch have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases. These decisions, to my mind, simply illustrate the above-quoted principle stated more than 50 years ago by Mr. Chief Justice Taft that delegations of legislative authority must be judged "according to common sense and the inherent necessities of the governmental co-ordination."

Viewing the legislation at issue here in light of these principles, I believe that it fails to pass muster. Read literally, the relevant portion of § 6 (b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of § 6 (b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power. For me the remaining question, then, is whether additional standards are ascertainable from the legislative history or statutory context of § 6 (b)(5) or, if not, whether

such a standardless delegation was justifiable in light of the "inherent necessities" of the situation.

II

One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question. The opinions of MR. JUSTICE STEVENS and MR. JUSTICE MARSHALL, however, give little more than a tip of the hat to the legislative origins of § 6 (b)(5). Such treatment is perhaps understandable, since the legislative history of that section, far from shedding light on what important policy choices Congress was making in the statute, gives one the feeling of viewing the congressional purpose "by the dawn's early light."

The precursor of § 6 (b)(5) was placed in the Occupational Safety and Health Act of 1970 while that bill was pending in the House Committee on Education and Labor. At that time, the section read:

> "The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health, or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." § 7 (a)(4), H. R. 16785, 91st Cong., 2d Sess., 49 (1970), Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. 943 (1971) (hereinafter Leg. Hist.).

Three aspects of this original proposal are particularly significant. First, and perhaps most importantly, as originally introduced the provision contained no feasibility limitation, providing instead that the Secretary "shall set the standard which most adequately assures" that no employee will suffer

harm. Second, it would have required the Secretary to protect employees from "any" impairment of health or functional capacity. Third, on its face, although perhaps not in its intent, the provision applied to both health and safety standards promulgated under the Act.[3]

There can be little doubt that, at this point in its journey through Congress, § 6 (b)(5) would have required the Secretary, in regulating toxic substances, to set the permissible level of exposure at a safe level or, if no safe level was known, at zero. When the Senate Committee on Labor and Public Welfare considered a provision identical in almost all respects to the House version, however, Senator Javits objected that the provision in question "might be interpreted to require absolute health and safety in all cases, regardless of feasibility. . . ." S. Rep. No. 91–1282, p. 58 (1970), Leg. Hist. 197. See also 116 Cong. Rec. 37327 (1970), Leg. Hist. 418. The Committee therefore amended the bill to provide that the Secretary "shall set the standard which most adequately *and feasibly*" assured that no employee would suffer any impairment of health. S. 2193, 91st Cong., 2d Sess., p. 39 (1970), Leg. Hist. 242 (emphasis added). The only additional explanation for this change appeared in the Senate Report accompanying the bill to the Senate floor. There, the Committee explained:

> "[S]tandards promulgated under section 6 (b) shall represent *feasible requirements*, which, where appropriate, shall be based on research, experiments, demonstrations, past experience, and the latest available scientific

[3] Respondents argue that, despite its seemingly general application, the original version of § 6 (b)(5) actually referred only to health hazards as opposed to safety hazards. See Addendum B to Brief for Respondents American Petroleum Institute et al. 5b–6b. In support of this proposition, they cite a portion of the legislative history where the House Committee on Education and Labor stated that the proposed version of § 6 (b)(5) would apply when the Secretary set an "occupational health standard." H. R. Rep. No. 91–1291, p. 18 (1970), Leg. Hist. 848.

> data. Such standards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health or functional capacity or diminished life expectancy, by reason of exposure to the hazard involved, even though such exposure may be over the period of his entire working life." S. Rep. No. 91–1282, p. 7 (1970), Leg. Hist. 147 (emphasis added).

Despite Senator Javits' inclusion of the words "and feasibly" in the provision, participants in the floor debate immediately characterized § 6 (b)(5) as requiring the Secretary "to establish a utopia free from any hazards" and to "assure that there will not be any risk at all." 116 Cong. Rec. 37614 (1970), Leg. Hist. 480–481 (remarks of Sen. Dominick). Senator Saxbe stated:

> "When we come to saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain. . . .
>
> "I believe the terms that we are passing back and forth are going to have to be identified." 116 Cong. Rec., at 26522, Leg. Hist. 345.

In response to these concerns, Senator Dominick introduced a substitute for the proposed provision, deleting the sentence at issue here entirely. He explained that his amendment would delete

> "the requirement in section 6 (b)(5) that the Secretary will establish occupational safety and health standards which most adequately and feasibly assure to the extent possible that *no* employee will suffer *any* impairment of health or functional capacity, or diminished life expectancy even if the employee has regular exposure to the hazard dealt with by the standard for the period of his working life.
>
> "This requirement is inherently confusing and unrealistic. It could be read to require the Secretary to ban all

occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself.

"If the provision is intended as no more than an admonition to the Secretary to do his duty, it seems unnecessary and could, if deemed advisable be included in the legislative history." (Emphasis in original.) 116 Cong. Rec., at 36530, Leg. Hist. 367.

Eventually, Senator Dominick and his supporters settled for the present language of § 6 (b)(5). This agreement resulted in three changes from the original version of the provision as amended by Senator Javits. First, the provision was altered to state explicitly that it applied only to standards for "toxic materials or harmful physical agents," in apparent contrast with safety standards. Second, the Secretary was no longer admonished to protect employees from "any" impairment of their health, but rather only from "material" impairments. Third, and most importantly for our purposes, the phrase "most adequately and feasibly assures" was revamped to read "most adequately assures, to the extent feasible."

We have been presented with a number of different interpretations of this shift. According to the Secretary, Senator Dominick recognized that he could not delete the seemingly absolute requirements of § 6 (b)(5) entirely, and instead agreed to limit its application to toxic materials or harmful physical agents and to specify that the Secretary was only to protect employees from material impairment of their health. Significantly, the Secretary asserts that his mandate to set such standards at the safest level technologically and eco-

nomically achievable remained unchanged by the Dominick amendment. According to the Secretary, the change in language from "most adequately and feasibly assures" to "most adequately assures, to the extent feasible," represented only a slight shift in emphasis, perhaps suggesting "a preference for health protection over cost." App. to Brief for Federal Parties 7a, n. 2. See also Brief for Federal Parties 59.

MR. JUSTICE MARSHALL reads this history quite differently. In his view, the version of § 6 (b)(5) that reached the Senate floor did not "clearly embod[y] the feasibility requirement" and thus was soundly criticized as being unrealistic. See *post*, at 693. It was only as a result of the floor amendments, which replaced "most adequately and feasibly assures" with "most adequately assures, to the extent feasible," that the Secretary clearly was authorized to reject a standard if it proved technologically or economically infeasible. See also *post*, at 710, and 720–721, n. 34.

Respondents cast yet a third light on these events, focusing upon a few places in the legislative history where the words "feasible" and "reasonable" were used more or less interchangeably. See S. Rep. No. 91–2193, pp. 8–10 (1969), Leg. Hist. 38–40; 115 Cong. Rec. 22517 (1969) (Sen. Javits). It is their contention that, when Congress said "feasible," it meant cost-justified. According to respondents, who agree in this regard with the Secretary, the meaning of the feasibility requirement did not change substantially between the version that left the Senate Committee on Labor and Public Welfare and the version that was ultimately adopted as part of the Act.

To my mind, there are several lessons to be gleaned from this somewhat cryptic legislative history. First, as pointed out by MR. JUSTICE MARSHALL, to the extent that Senator Javits, Senator Dominick, and other Members were worried about imposing upon the Secretary the impossible burden of assuring absolute safety, they did not view § 3 (8) of the Act

as a limitation on that duty. I therefore find it difficult to accept the conclusion of the lower court, as embellished by respondents, that § 3 (8) acts as a general check upon the Secretary's duty under § 6 (b)(5) to adopt the most protective standard feasible.

Second, and more importantly, I believe that the legislative history demonstrates that the feasibility requirement, as employed in § 6 (b)(5), is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder. I am unable to accept MR. JUSTICE MARSHALL's argument that, by changing the phrasing of § 6 (b)(5) from "most adequately and feasibly assures" to "most adequately assures, to the extent feasible," the Senate injected into that section something that was not already there.[4] If I am correct in this regard, then the amendment introduced by Senator Javits to relieve the Secretary of the duty to create a risk-free workplace left Senator Dominick free to object to the amended provision on the same grounds. Perhaps Senator Dominick himself offered the aptest description of the feasibility requirement as "no more than an admonition to the Secretary to do his duty. . . ." 116 Cong. Rec. 36530 (1970); Leg. Hist. 367.

In sum, the legislative history contains nothing to indicate that the language "to the extent feasible" does anything other

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[4] The legislative history indicates strongly that Senator Dominick himself saw little, if any, difference between the phrases "most adequately and feasibly assures" and "most adequately assures, to the extent feasible." In the course of his earlier attempt to delete the first sentence of § 6 (b)(5) entirely, he paraphrased the unamended version of that section as requiring the Secretary to promulgate standards that "most adequately and feasibly assure *to the extent possible*" that no employee would suffer harm. See 116 Cong. Rec. 36530 (1970), Leg. Hist. 367 (emphasis added). Unless Senator Dominick found a significant difference between the words "possible" and "feasible," it is clear that there is little difference between Senator Dominick's perception of what the unamended section required in the way of feasibility and what that section required after his amendment.

than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory. There is certainly nothing to indicate that these words, as used in § 6 (b)(5), are limited to technological and economic feasibility. When Congress has wanted to limit the concept of feasibility in this fashion, it has said so, as is evidenced in a statute enacted the same week as the provision at issue here.[5] I also question whether the Secretary wants to assume the duties such an interpretation would impose upon him. In these cases, for example, the Secretary actually declined to adopt a standard lower than 1 ppm for some industries, not because it was economically or technologically infeasible, but rather because "different levels for different industries would result in serious administrative difficulties." 43 Fed. Reg. 5947 (1978). See also *ante*, at 650 (plurality opinion). If § 6 (b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards for any reason whatsoever, including even political feasibility.

III

In prior cases this Court has looked to sources other than the legislative history to breathe life into otherwise vague delegations of legislative power. In *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104 (1946), for example, this Court concluded that certain seemingly vague delegations "derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." Here, however, there is little or nothing in the

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[5] Sections 211 (c)(2)(A) and (B) of the Clean Air Act, as amended on Dec. 31, 1970, 84 Stat. 1698, authorize the Environmental Protection Agency to regulate, control, or prohibit automotive fuel additives after "consideration of other *technologically or economically feasible* means of achieving emission standards. . . ." 42 U. S. C. § 7545 (c)(2)(A) (1976 ed., Supp. II) (emphasis added).

remaining provisions of the Occupational Safety and Health Act to provide specificity to the feasibility criterion in § 6 (b) (5). It may be true, as suggested by MR. JUSTICE MARSHALL, that the Act as a whole expresses a distinct preference for safety over dollars. But that expression of preference, as I read it, falls far short of the proposition that the Secretary must eliminate marginal or insignificant risks of material harm right down to an industry's breaking point.

Nor are these cases like *Lichter* v. *United States*, 334 U. S. 742, 783 (1948), where this Court upheld delegation of authority to recapture "excessive profits" in light of a pre-existing administrative practice. Here, the Secretary's approach to toxic substances like benzene could not have predated the enactment of § 6 (b)(5) itself. Moreover, there are indications that the postenactment administrative practice has been less than uniform. For example, the Occupational Safety and Health Review Commission (OSHRC), the body charged with adjudicating citations issued by the Secretary under the Act, apparently does not agree with the definition of "feasibility," advanced in these cases by the Secretary. In *Continental Can Co.*, 4 OSHC 1541, 1976–1977 OSHD ¶ 21,009 (1976), the Commission reasoned:

> "Clearly, employers have finite resources available for use to abate health hazards. And just as clearly if they are to be made to spend without limit for abatement of this hazard their financial ability to abate other hazards, including life threatening hazards, is reduced." *Id.*, at 1547, 1976–1977 OSHD, p. 25,256.

Furthermore, the record in these cases contains at least one indication that the Secretary himself was, at one time, quite uncertain what limits § 6 (b)(5) placed upon him. In announcing the proposed 1 ppm standard and discussing its economic ramifications, the Secretary explained that "[w]hile the precise meaning of feasibility is not clear from the Act, it is

OSHA's view that the term may include the economic ramifications of requirements imposed by standards." 43 Fed. Reg. 5934 (1978). This candid and tentative statement falls far short of the Secretary's present position that economic and technological considerations set the only limits on his duty to adopt the most protective standard. Finally, as noted earlier, the Secretary has failed to apply his present stringent view uniformly, rejecting in these cases a lower standard for some industries on the grounds of administrative convenience.

In some cases where broad delegations of power have been examined, this Court has upheld those delegations because of the delegatee's residual authority over particular subjects of regulation. In *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 307 (1936), this Court upheld a statute authorizing the President to prohibit the sale of arms to certain countries if he found that such a prohibition would "contribute to the reestablishment of peace." This Court reasoned that, in the area of foreign affairs, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.*, at 320. Similarly, *United States* v. *Mazurie*, 419 U. S. 544 (1975), upheld a broad delegation of authority to various Indian tribes to regulate the introduction of liquor into Indian country. According to *Mazurie* limitations on Congress' authority to delegate legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.*, at 556–557. In the present cases, however, neither the Executive Branch in general nor the Secretary in particular enjoys any independent authority over the subject matter at issue.

Finally, as indicated earlier, in some cases this Court has abided by a rule of necessity, upholding broad delegations of authority where it would be "unreasonable and impracticable

to compel Congress to prescribe detailed rules" regarding a particular policy or situation. *American Power & Light Co.* v. *SEC*, 329 U. S., at 105. See also *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904). But no need for such an evasive standard as "feasibility" is apparent in the present cases. In drafting § 6 (b)(5), Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry. That Congress recognized the difficulty of this choice is clear from the previously noted remark of Senator Saxbe, who stated that "[w]hen we come to saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain." 116 Cong. Rec. 36522 (1970), Leg. Hist. 345. That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected and is capsulized in Senator Saxbe's unfulfilled promise that "the terms that we are passing back and forth are going to have to be identified." *Ibid.*

IV

As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. See *Arizona* v. *California*, 373 U. S. 546, 626 (1963) (Harlan, J., dissenting in part); *United States* v. *Robel*, 389 U. S. 258, 276 (1967) (BRENNAN, J., concurring in result). Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an

"intelligible principle" to guide the exercise of the delegated discretion. See *J. W. Hampton & Co.* v. *United States*, 276 U. S., at 409; *Panama Refining Co.* v. *Ryan*, 293 U. S., at 430. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. See *Arizona* v. *California*, *supra*, at 626 (Harlan, J., dissenting in part); *American Power & Light Co.* v. *SEC*, *supra*, at 106.

I believe the legislation at issue here fails on all three counts. The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy. For Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat—reflected in the cases cited earlier in this opinion—that legislatures are to make laws, not legislators. Nor, as I think the prior discussion amply demonstrates, do the provisions at issue or their legislative history provide the Secretary with any guidance that might lead him to his somewhat tentative conclusion that he must eliminate exposure to benzene as far as technologically and economically possible. Finally, I would suggest that the standard of "feasibility" renders meaningful judicial review impossible.

We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as one writer has phrased it, "a case of death by association." J. Ely, Democracy and Distrust, A Theory of Judicial Review 133 (1980). Indeed, a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to po-

litically unresponsive administrators.[6] Other observers, as might be imagined, have disagreed.[7]

If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. Far from detracting from the substantive authority of Congress, a declaration that the first sentence of § 6 (b)(5) of the Occupational Safety and Health Act constitutes an invalid delegation to the Secretary of Labor would preserve the authority of Congress. If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.

I would invalidate the first sentence of § 6 (b)(5) of the Occupational Safety and Health Act of 1970 as it applies to

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[6] See J. Ely, Democracy and Distrust, A Theory of Judicial Review 131–134 (1980); J. Freedman, Crisis and Legitimacy, The Administrative Process and American Government 78–94 (1978); T. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority 129–146, 297–299 (1969); Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 582–587 (1972); Waist-Deep in Regulation, Washington Post, Nov. 3, 1979, p. A10, col. 1. Cf. W. Douglas, Go East, Young Man 217 (1974).

[7] See K. Davis, Discretionary Justice: A Preliminary Inquiry 49–51 (1969); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1693–1697 (1975). Cf. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1190, n. 37 (1973).

any toxic substance or harmful physical agent for which a safe level, that is, a level at which "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to [that hazard] for the period of his working life," is, according to the Secretary, unknown or otherwise "infeasible." Absent further congressional action, the Secretary would then have to choose, when acting pursuant to § 6 (b)(5), between setting a safe standard or setting no standard at all.[8] Accordingly, for the reasons stated above, I concur in the judgment of the Court affirming the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join, dissenting.

In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See *TVA* v. *Hill*, 437 U. S. 153 (1978).

Today's decision flagrantly disregards these restrictions on judicial authority. The plurality ignores the plain meaning of the Occupational Safety and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy. The unfortunate consequence is that the Federal Government's efforts to protect American workers from cancer and other crippling diseases may be substantially impaired.

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[8] This ruling would not have any effect upon standards governing toxic substances or harmful physical agents for which safe levels are feasible, upon extant standards promulgated as "national consensus standards" under § 6 (a), nor upon the Secretary's authority to promulgate "emergency temporary standards" under § 6 (c).

The first sentence of § 6 (b)(5) of the Act provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U. S. C. § 655 (b)(5).

In this case the Secretary of Labor found, on the basis of substantial evidence, that (1) exposure to benzene creates a risk of cancer, chromosomal damage, and a variety of non-malignant but potentially fatal blood disorders, even at the level of 1 ppm; (2) no safe level of exposure has been shown; (3) benefits in the form of saved lives would be derived from the permanent standard; (4) the number of lives that would be saved could turn out to be either substantial or relatively small; (5) under the present state of scientific knowledge, it is impossible to calculate even in a rough way the number of lives that would be saved, at least without making assumptions that would appear absurd to much of the medical community; and (6) the standard would not materially harm the financial condition of the covered industries. The Court does not set aside any of these findings. Thus, it could not be plainer that the Secretary's decision was fully in accord with his statutory mandate "most adequately [to] assur[e] . . . that no employee will suffer material impairment of health or functional capacity. . . ."

The plurality's conclusion to the contrary is based on its interpretation of 29 U. S. C. § 652 (8), which defines an occupational safety and health standard as one "which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment. . . ." According to the plurality, a standard is not "reasonably necessary or appropriate"

unless the Secretary is able to show that it is "at least more likely than not," *ante*, at 653, that the risk he seeks to regulate is a "significant" one. *Ibid.* Nothing in the statute's language or legislative history, however, indicates that the "reasonably necessary or appropriate" language should be given this meaning. Indeed, both demonstrate that the plurality's standard bears no connection with the acts or intentions of Congress and is based only on the plurality's solicitude for the welfare of regulated industries. And the plurality uses this standard to evaluate not the agency's decision in this case, but a strawman of its own creation.

Unlike the plurality, I do not purport to know whether the actions taken by Congress and its delegates to ensure occupational safety represent sound or unsound regulatory policy. The critical problem in cases like the ones at bar is scientific uncertainty. While science has determined that exposure to benzene at levels above 1 ppm creates a definite risk of health impairment, the magnitude of the risk cannot be quantified at the present time. The risk at issue has hardly been shown to be insignificant; indeed, future research may reveal that the risk is in fact considerable. But the existing evidence may frequently be inadequate to enable the Secretary to make the threshold finding of "significance" that the Court requires today. If so, the consequence of the plurality's approach would be to subject American workers to a continuing risk of cancer and other fatal diseases, and to render the Federal Government powerless to take protective action on their behalf. Such an approach would place the burden of medical uncertainty squarely on the shoulders of the American worker, the intended beneficiary of the Occupational Safety and Health Act. It is fortunate indeed that at least a majority of the Justices reject the view that the Secretary is prevented from taking regulatory action when the magnitude of a health risk cannot be quantified on the basis of current techniques. See *ante*, at 666 (POWELL, J., concurring in part

and concurring in judgment); see also *ante*, at 656, and n. 63 (plurality opinion).

Because today's holding has no basis in the Act, and because the Court has no authority to impose its own regulatory policies on the Nation, I dissent.

I

Congress enacted the Occupational Safety and Health Act as a response to what was characterized as "the grim history of our failure to heed the occupational health needs of our workers." [1] The failure of voluntary action and legislation at the state level, see S. Rep. No. 91–1282, p. 4 (1970), Leg. Hist. 144, had resulted in a "bleak" and "worsening" [2] situation in which 14,500 persons had died annually as a result of conditions in the workplace. In the four years preceding the Act's passage, more Americans were killed in the workplace than in the contemporaneous Vietnam War, S. Rep. No. 91–1283, at 2, Leg. Hist. 142. The Act was designed as "a safety bill of rights for close to 60 million workers." [3] Its stated purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U. S. C. § 651 (b). See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 444–445 (1977).

The Act is enforced primarily through two provisions. First, a "general duty" is imposed upon employers to furnish employment and places of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . ." 29 U. S. C. § 654 (a)(1). Second, the Secretary of Labor is authorized to set "occupational safety

[1] Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. iii (1971) (Foreword by Sen. Williams) (hereinafter Leg. Hist.).

[2] S. Rep. No. 91–1282, p. 2 (1970), Leg. Hist. 142.

[3] Leg. Hist. iii.

and health standards," defined as standards requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U. S. C. § 652 (8).

The legislative history of the Act reveals Congress' particular concern for health hazards of "unprecedented complexity" that had resulted from chemicals whose toxic effects "are only now being discovered." S. Rep. No. 91–1282, *supra*, at 2, Leg. Hist. 142. "Recent scientific knowledge points to hitherto unsuspected cause-and-effect relationships between occupational exposures and many of the so-called chronic diseases—cancer, respiratory ailments, allergies, heart disease, and others." *Ibid.* Members of Congress made repeated references to the dangers posed by carcinogens and to the defects in our knowledge of their operation and effect.[4] One of the primary purposes of the Act was to ensure regulation of these "insidious 'silent' killers." [5]

This special concern led to the enactment of the first sentence of 29 U. S. C. § 655 (b)(5), which, as noted above, provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

This directive is designed to implement three legislative pur-

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[4] S. Rep. No. 91–1282, p. 2 (1970), Leg. Hist. 142; 116 Cong. Rec. 37326 (1970), Leg. Hist. 415 (Sen. Williams); H. R. Rep. No. 91–1291, p. 19 (1970), Leg. Hist. 849; 116 Cong. Rec. 38392–38393 (1970), Leg. Hist. 1049 (Rep. Karth).

[5] 116 Cong. Rec. 38375 (1970), Leg. Hist. 1003 (Sen. Daniels).

poses. First, Congress recognized that there may be substances that become dangerous only upon repeated or frequent exposure.[6] The Secretary was therefore required to provide protection even from substances that would cause material impairment only upon exposure occurring throughout an employee's working life. Second, the requirement that the Secretary act on the basis of "the best *available* evidence" was intended to ensure that the standard-setting process would not be destroyed by the uncertainty of scientific views. Recognizing that existing knowledge may be inadequate, Congress did not require the Secretary to wait until definitive information could be obtained. Thus "it is not intended that the Secretary be paralyzed by debate surrounding diverse medical opinions." H. R. Rep. No. 91–1291, p. 18 (1970), Leg. Hist. 848. Third, Congress' special concern for the "silent killers" was felt to justify an especially strong directive to the Secretary in the standard-setting process. 116 Cong. Rec. 37622 (1970), Leg. Hist. 502 (Sen. Dominick).

The authority conferred by § 655 (b)(5), however, is not absolute. The subsection itself contains two primary limitations. The requirement of "material" impairment was designed to prohibit the Secretary from regulating substances that create a trivial hazard to affected employees.[7] Moreover, all standards promulgated under the subsection must be "feasible." During the floor debates Congress expressed concern that a prior version of the bill, not clearly embodying the feasibility requirement, would require the Secretary to close down whole industries in order to eliminate risks of impairment. This standard was criticized as unrealistic.[8]

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[6] 116 Cong. Rec., at 37623, Leg. Hist. 503 (Sen. Dominick); H. R. No. 91–1291, p. 28 (1970), Leg. Hist. 858.

[7] See n. 34, *infra*.

[8] An earlier version of the bill had provided:

"The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately and feasibly assures, on the basis of the best available evidence, that no employee will suffer any impairment

The feasibility requirement was imposed as an affirmative limit on the standard-setting power.

The remainder of § 655 (b)(5), applicable to all safety and health standards, requires the Secretary to base his standards "upon research, demonstrations, experiments, and such other information as may be appropriate." In setting standards, the Secretary is directed to consider "the attainment of the highest degree of health and safety protection for the employee" and also "the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws."

The Act makes provision for judicial review of occupational safety and health standards promulgated pursuant to § 655 (b)(5). The reviewing court must uphold the Secretary's

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of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." S. 2193, 91st Cong., 2d Sess., 39 (1970), Leg. Hist. 242.

This standard, it was feared, "could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." 116 Cong. Rec. 36530 (1970), Leg. Hist. 367 (Statement on Amendment of Sen. Dominick). In explaining the present language, Senator Dominick stated:

"What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard . . . so that no one would have any problem for the rest of his working life.

"It was an unrealistic standard. As modified, we would be approaching the problem by looking at the problem and setting a standard or criterion which would not result in harm." 116 Cong. Rec., at 37622, Leg. Hist. 502.

determinations if they are supported by "substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). It is to that evidence that I now turn.

II

The plurality's discussion of the record in this case is both extraordinarily arrogant and extraordinarily unfair. It is arrogant because the plurality presumes to make its own factual findings with respect to a variety of disputed issues relating to carcinogen regulation. See, *e. g.*, *ante*, at 656–657, and n. 64. It should not be necessary to remind the Members of this Court that they were not appointed to undertake independent review of adequately supported scientific findings made by a technically expert agency.[9] And the plurality's discussion is unfair because its characterization of the Secretary's report bears practically no resemblance to what the Secretary actually did in this case. Contrary to the plurality's suggestion, the Secretary did not rely blindly on some Draconian carcinogen "policy." See *ante*, at 624–625, 635–636. If he had, it would have been sufficient for him to have observed that

[9] I do not, of course, suggest that it is appropriate for a federal court reviewing agency action blindly to defer to the agency's findings of fact and determinations of policy. Under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971), courts must undertake a "searching and careful" judicial inquiry into those factors. Such an inquiry is designed to require the agency to take a "hard look," *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976) (citation omitted), by considering the proper factors and weighing them in a reasonable manner. There is also room for especially rigorous judicial scrutiny of agency decisions under a rationale akin to that offered in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). See *Environmental Defense Fund* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971).

I see no basis, however, for the approach taken by the plurality today, which amounts to nearly *de novo* review of questions of fact and of regulatory policy on behalf of institutions that are by no means unable to protect themselves in the political process. Such review is especially inappropriate when the factual questions at issue are ones about which the Court cannot reasonably be expected to have expertise.

benzene is a carcinogen, a proposition that respondents do not dispute. Instead, the Secretary gathered over 50 volumes of exhibits and testimony and offered a detailed and evenhanded discussion of the relationship between exposure to benzene at all recorded exposure levels and chromosomal damage, aplastic anemia, and leukemia. In that discussion he evaluated, and took seriously, respondents' evidence of a safe exposure level. See also *ante*, at 666 (POWELL, J., concurring in part and in judgment).

The hearings on the proposed standard were extensive, encompassing 17 days from July 19 through August 10, 1977. The 95 witnesses included epidemiologists, toxicologists, physicians, political economists, industry representatives, and members of the affected work force. Witnesses were subjected to exhaustive questioning by representatives from a variety of interested groups and organizations.

Three basic positions were presented at the hearings. The first position was that the proposed 1 ppm standard was necessary because exposure to benzene would cause material impairment of the health of workers no matter how low the exposure level. Some direct evidence indicated that exposure to benzene had caused chromosomal damage, blood disorders, and leukemia at or below the 10 ppm level itself. More important, it was suggested that the recorded effects of benzene at higher levels required an inference that leukemia and other disorders would result at levels of 1 ppm and lower, especially after the prolonged exposure typical in industrial settings. Therefore, the standard should be set at the lowest feasible level, which was 1 ppm.

The second position was that a 1 ppm exposure level would itself pose an unwarranted threat to employee health and safety and that the available evidence necessitated a significantly lower level. An exposure limit below 1 ppm, it was argued, would be feasible. There were suggestions that benzene was gradually being replaced in many of the affected

industries and that most companies were already operating at or below the 1 ppm level.

The third position was that the 1971 standard should be retained. Proponents of this position suggested that evidence linking low levels of benzene exposure to leukemia was uncertain, that the current exposure limit was sufficiently safe, and that the benefits of the proposed standard would be insufficient to justify the standard's costs. In addition, there was testimony that the expenses required by the proposed standard would be prohibitive.

The regulations announcing the permanent standard for benzene are accompanied by an extensive statement of reasons summarizing and evaluating the results of the hearings. The Secretary found that the evidence showed that exposure to benzene causes chromosomal damage, a variety of nonmalignant blood disorders, and leukemia. 43 Fed. Reg. 5921 (1978). He concluded that low concentrations imposed a hazard that was sufficiently grave to call for regulatory action under the Act.

Evidence of deleterious effects. The Secretary referred to studies which conclusively demonstrated that benzene could damage chromosomes in blood-forming cells. *Id.*, at 5932. There was testimony suggesting a causal relationship between chromosomal damage and leukemia, although it could not be determined whether and to what extent such damage would impair health. *Id.*, at 5933.[10] Some studies had suggested chromosomal damage at exposure levels of 10–25 ppm and lower.[11] No quantitative dose-response curve, showing the relationship between exposure levels and incidence of chromosomal damage, could yet be established. *Id.*, at 5933–5934. The evidence of chromosomal damage was, in the Secretary's view, a cause for "serious concern." *Id.*, at 5933.

The most common effect of benzene exposure was a de-

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[10] Tr. 258–259, 1039.

[11] *Id.*, at 148, 200–201, 258.

crease in the levels of blood platelets and red and white blood cells. If sufficiently severe, the result could be pancytopenia or aplastic anemia, noncancerous but potentially fatal diseases. There was testimony that some of the nonmalignant blood disorders caused by benzene exposure could progress to, or represented, a preleukemic stage which might eventually evolve into a frank leukemia. *Id.*, at 5922.[12]

Considerable evidence showed an association between benzene and nonmalignant blood disorders at low exposure levels. Such an association had been established in one study in which the levels frequently ranged from zero to 25 ppm with some concentrations above 100 ppm, *ibid.*; in another they ranged from 5 to 30 ppm, *id.*, at 5923. Because of the absence of adequate data, a dose-response curve showing the relationship between benzene exposure and blood disorders could not be constructed. There was considerable testimony, however, that such disorders had resulted from exposure to benzene at or near the current level of 10 ppm and lower.[13] The Secretary concluded that the current standard did not provide adequate protection. He observed that a "safety factor" of 10 to 100 was generally used to discount the level at which a causal connection had been found in existing studies.[14] Under this approach, he concluded that, quite apart from any leukemia risk, the permissible exposure limit should be set at a level considerably lower than 10 ppm.

Finally, there was substantial evidence that exposure to benzene caused leukemia. The Secretary concluded that the evidence established that benzene was a carcinogen. A causal relationship between benzene and leukemia was first reported in France in 1897, and since that time similar results had been found in a number of countries, including Italy, Turkey, Japan, Switzerland, the Soviet Union, and the United

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[12] *Id.*, at 145, 173–174, 352, 1227, 1928, 3206; 15 Record, Ex. 43B, p. 166.
[13] *Id.*, at 149, 360–361, 997, 1023, 2543, 2689, 3203; 11 Record, Ex. 3.
[14] Tr. 149, 1218, 2692, 2847.

States. The latest study, undertaken by the National Institute for Occupational Safety and Health (NIOSH) in the 1970's, reported a fivefold excess over the normal incidence of leukemia among workers exposed to benzene at industrial plants in Ohio. There was testimony that this study seriously understated the risk.[15]

The Secretary reviewed certain studies suggesting that low exposure levels of 10 ppm and more did not cause any excess incidence of leukemia. Those studies, he suggested, suffered from severe methodological defects, as their authors frankly acknowledged.[16] Finally, the Secretary discussed a study suggesting a statistically significant excess in leukemia at levels of 2 to 9 ppm. *Ibid.*[17] He found that, despite certain deficiencies in the study, it should be considered as consistent with other studies demonstrating an excess leukemia risk among employees exposed to benzene. *Id.*, at 5928.

Areas of uncertainty. The Secretary examined three areas

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[15] *Id.*, at 308, 314, 747, 768, 769–770, 874, 2445. As the Secretary observed, the issue of the exposure level in the NIOSH study was extensively debated during the hearings. A report from the Industrial Commission of Ohio suggested that concentrations generally ranged from zero to 10 or 15 ppm. But the Secretary concluded that evidence at the hearings showed that area exposures during the study period had sometimes substantially exceeded that level. Because of the conflicting evidence and the absence of monitoring data, he found that the excess leukemia risk observed in the NIOSH study could not be linked to any particular exposure level.

[16] As to the study on which industry relied most heavily, for example, the Secretary, largely repeating the author's own admissions, observed that (1) a number of employees included in the sample may not have been exposed to benzene at any time; (2) there was inadequate followup of numerous employees, so that persons who may have contracted leukemia were not included in the data; (3) the diagnoses were subject to serious question, and cases of leukemia may have gone unnoticed; (4) no determination of exposure levels had been made; and (5) the occupational histories of the workers were admittedly incomplete. 43 Fed. Reg. 5928 (1978).

[17] Tr. 1023–1024, 1227; 22A Record, Ex. 154.

of uncertainty that had particular relevance to his decision. First, he pointed to evidence that the latency period for benzene-induced leukemia could range from 2 to over 20 years. *Id.*, at 5930. Since lower exposure levels lead to an increase in the latency period, it would be extremely difficult to obtain evidence showing the dose-response relationship between leukemia and exposure to low levels of benzene. Because there has been no adequate monitoring in the past, it would be practically impossible to determine what the exposure levels were at a time sufficiently distant so that the latency period would have elapsed. The problem was compounded by the difficulty of conducting a suitable study. Because exposure levels approaching 10 ppm had been required only recently, direct evidence showing the relationship between leukemia and exposure levels between 1 and 10 ppm would be unavailable in the foreseeable future.

Second, the Secretary observed that individuals have differences in their susceptibility to leukemia. *Ibid.* Among those exposed to benzene was a group of unknown but possibly substantial size having various "predisposing factors" whose members were especially vulnerable to the disease. *Id.*, at 5930, 5946. The permanent standard was designed to minimize the effects of exposure for these susceptible individuals as well as for the relatively insensitive, *id.*, at 5946, and also to facilitate early diagnosis and treatment. *Id.*, at 5930.

The Secretary discussed the contention that a safe level of exposure to benzene had been demonstrated. From the testimony of numerous scientists, he concluded that it had not. *Id.*, at 5932.[18] He also found that although no dose-response curve could be plotted, *id.*, at 5946,[19] the extent of the risk

[18] The testimony of Dr. Aksoy, one of the world's leading experts, was typical: "[E]ven one ppm . . . causes leukemia." Tr. 204. See also *id.*, at 30, 150, 262, 328, 351–352, 363–364, 394, 745-746, 1057, 1210, 2420; 9 Record, Ex. 2.8–272, p. 1.

[19] Tr. 130, 360, 414–415, 416–417, 760–761, 781–782, 925, 1055–1056; 17 Record, Ex. 75, p. 2; 1 Record, Ex. 2–4, p. 11.

would decline with the exposure level. *Ibid.*[20] Exposure at a level of 1 ppm would therefore be less dangerous than exposure at one of 10 ppm. The Secretary found that the existing evidence justified the conclusion that he should not "wait for answers" while employees continued to be exposed to benzene at hazardous levels.

Finally, the Secretary responded to the argument that the permissible exposure level should be zero or lower than 1 ppm. *Id.*, at 5947.[21] Even though many industries had already achieved the 1 ppm level, he found that a lower level would not be feasible. *Ibid.*

Costs and benefits. The Secretary offered a detailed discussion of the role that economic considerations should play in his determination. He observed that standards must be "feasible," both economically and technologically. In his view the permanent standard for benzene was feasible under both tests. The economic impact would fall primarily on the more stable industries, such as petroleum refining and petrochemical production. *Id.*, at 5934. These industries would be able readily to absorb the costs or to pass them on to consumers. None of the 20 affected industries, involving 157,000 facilities and 629,000 exposed employees, *id.*, at 5935, would be unable to bear the required expenditures, *id.*, at 5934. He concluded that the compliance costs were "well within the financial capability of the covered industries." *Id.*, at 5941. An extensive survey of the national economic impact of the standard, undertaken by a private contractor, found first-year operating costs of between $187 and $205 million, recurring annual costs of $34 million, and investment in engineering controls of about $266 million.[22] Since respondents have not at-

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[20] Tr. 382, 401, 405, 1372, 2846, 2842–2843.

[21] *Id.*, at 148–149 ("the permissible exposure limit for benzene should be zero") (testimony of Dr. Aksoy). See also *id.*, at 1251 *et seq.*, 3506 *et seq.*

[22] The plurality's estimate of the amount of expenditure per employee, see *ante*, at 629, is highly misleading. Most of the costs of the benzene

tacked the Secretary's basic conclusions as to cost, the Secretary's extensive discussion need not be summarized here.

Finally, the Secretary discussed the benefits to be derived from the permanent standard. During the hearings, it had been argued that the Secretary should estimate the health benefits of the proposed regulation. To do this he would be required to construct a dose-response curve showing, at least in a rough way, the number of lives that would be saved at each possible exposure level. Without some estimate of benefits, it was argued, the Secretary's decisionmaking would be defective. During the hearings an industry witness attempted to construct such a dose-response curve. Restricting himself to carcinogenic effects, he estimated that the proposed standard would save two lives every six years and suggested that this relatively minor benefit would not justify the regulation's costs.

The Secretary rejected the hypothesis that the standard would save only two lives in six years. This estimate, he concluded, was impossible to reconcile with the evidence in the record. *Ibid.*[23] He determined that, because of numer-

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standard would be incurred only once and would thus protect an unascertainable number of employees in the future; that number will be much higher than the number of employees currently employed.

[22] The projection, designed as an extrapolation from an amalgamation of existing studies, was dependent on a number of assumptions which the Secretary could reasonably view as questionable. Indeed, the witness himself stated that his estimate was based on "a lousy set of data," was "slightly better than a guess," Tr. 2772, and that there was "no real basis," *id.*, at 2719, for a dose-response curve on which the estimate was wholly dependent.

The witness' assumptions were severely tested during the hearings, see *id.*, at 2795 *et seq.*, and the Secretary could reasonably reject them on the basis of the evidence in the record. For example: (1) The witness appeared to assume that in previous tests leukemia had been contracted after a lifetime of exposure; the evidence afforded no basis for that assumption, and the duration of exposure may have been quite short for particular employees. If the duration period was short, the witness' estimate would have been much too low. (2) The witness assumed that exposure levels in the NIOSH study were around 100 ppm. The Secretary

ous uncertainties in the existing data, it was impossible to construct a dose-response curve by extrapolating from those data to lower exposure levels.[24] More generally, the Secre-

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found, however, that no such assumption could be made, and there was evidence that exposure levels had generally been between zero and 10–15 ppm. (3) The witness assumed that the dose-response curve was linear at all levels, but there was no basis for that assumption. In the case of vinyl chloride (another carcinogen for which the Secretary has promulgated exposure standards), recent evidence suggested that the dose-response curve rises steeply at low doses and becomes less steep as the levels are increased. (4) Twenty-five percent of the workers in the NIOSH study had not been found, and the witness assumed that they were still alive and would not contract leukemia. Six hundred additional workers exposed in that study were still alive; the witness assumed they too would not contract leukemia. There was considerable testimony that, for these and other reasons, the NIOSH study significantly underestimated the risk. The witness assumes that it had not. (5) The NIOSH study found a fivefold excess risk from benzene exposure; the witness assumed that the excess was much lower, despite the NIOSH finding and the testimony that that finding was a significant understatement of the risk. In light of these uncertainties, the Secretary could conclude that the witness' estimate was unsupportable.

[24] Witnesses testifying to the inability to construct a dose-response curve referred primarily to the impossibility of correlating the incidence of leukemia, blood disorders, and chromosomal damage with the levels and duration of exposure in past studies. Thus Dr. Herman Kraybill of the National Cancer Institute testified:

"[W]e like to estimate risk factors. This has been done, as many of you recall, with vinyl chloride several years ago.

". . . [T]o estimate the risk factors on [the basis of] experimental data, this presupposes if you have good toxicity data. When I say toxicity data, I mean good dose-response data on vinyl chloride, which indeed we did have that.

"But with benzene, it appeared that we didn't have this situation, so therefore, most of us gave up. . . .

. . . . . .

". . . With benzene, we sort of struck out." *Id.*, at 760–761.

Because of the enormous uncertainties in levels and duration of exposure in prior studies, any assumptions would necessarily be arbitrary. The possible range of assumptions was so great that the ultimate conclusion would be entirely uninformative. See *id.*, at 360, 415, 1055–1056.

tary observed that it had not been established that there was a safe level of exposure for benzene. Since there was considerable testimony that the risk would decline with the exposure level, *id.*, at 5940, the new standard would save lives. The number of lives saved "may be appreciable," but there was no way to make a more precise determination.[25] The question was "on the frontiers of scientific knowledge." *Ibid.*

The Secretary concluded that, in light of the scientific uncertainty, he was not required to calculate benefits more precisely. *Id.*, at 5941. In any event he gave "careful consideration" to the question of whether the admittedly substantial costs were justified in light of the hazards of benzene exposure. He concluded that those costs were "necessary" in order to promote the purposes of the Act.

III

A

This is not a case in which the Secretary found, or respondents established, that no benefits would be derived from a permanent standard, or that the likelihood of benefits was insignificant. Nor was it shown that a quantitative estimate of benefits could be made on the basis of "the best available evidence." Instead, the Secretary concluded that benefits will result, that those benefits "may" be appreciable, but that the dose-response relationship of low levels of benzene

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[25] At one point the Secretary did indicate that appreciable benefits were "likely" to result. The Court of Appeals held that this conclusion was unsupported by substantial evidence. The Secretary's suggestion, however, was made in the context of a lengthy discussion intended to show that appreciable benefits "may" be predicted but that their likelihood could not be quantified. The suggestion should not be taken as a definitive statement that appreciable benefits were more probable than not.

For reasons stated *infra*, there is nothing in the Act to prohibit the Secretary from acting when he is unable to conclude that appreciable benefits are more probable than not.

exposure and leukemia, nonmalignant blood disorders, and chromosomal damage was impossible to determine. The question presented is whether, in these circumstances, the Act permits the Secretary to take regulatory action, or whether he must allow continued exposure until more definitive information becomes available.

As noted above, the Secretary's determinations must be upheld if supported by "substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). This standard represents a legislative judgment that regulatory action should be subject to review more stringent than the traditional "arbitrary and capricious" standard for informal rulemaking. We have observed that the arbitrary and capricious standard itself contemplates a searching "inquiry into the facts" in order to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1971). Careful performance of this task is especially important when Congress has imposed the comparatively more rigorous "substantial evidence" requirement. As we have emphasized, however, judicial review under the substantial evidence test is ultimately deferential. See, *e. g.*, *Richardson* v. *Perales*, 402 U. S. 389, 401 (1971); *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607, 618–621 (1966). The agency's decision is entitled to the traditional presumption of validity, and the court is not authorized to substitute its judgment for that of the Secretary. If the Secretary has considered the decisional factors and acted in conformance with the statute, his ultimate decision must be given a large measure of respect. *Id.*, at 621.

The plurality is insensitive to three factors which, in my view, make judicial review of occupational safety and health standards under the substantial evidence test particularly difficult. First, the issues often reach a high level of technical complexity. In such circumstances the courts are required to immerse themselves in matters to which they are unaccus-

tomed by training or experience. Second, the factual issues with which the Secretary must deal are frequently not subject to any definitive resolution. Often "the factual finger points, it does not conclude." *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F. 2d 1301, 1308 (CA2) (Clark, J.), cert. denied, 421 U. S. 992 (1975). Causal connections and theoretical extrapolations may be uncertain. Third, when the question involves determination of the acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of the facts.

The decision to take action in conditions of uncertainty bears little resemblance to the sort of empirically verifiable factual conclusions to which the substantial evidence test is normally applied. Such decisions were not intended to be unreviewable; they too must be scrutinized to ensure that the Secretary has acted reasonably and within the boundaries set by Congress. But a reviewing court must be mindful of the limited nature of its role. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519 (1978). It must recognize that the ultimate decision cannot be based solely on determinations of fact, and that those factual conclusions that have been reached are ones which the courts are ill-equipped to resolve on their own.

Under this standard of review, the decision to reduce the permissible exposure level to 1 ppm was well within the Secretary's authority. The Court of Appeals upheld the Secretary's conclusions that benzene causes leukemia, blood disorders, and chromosomal damage even at low levels, that an exposure level of 10 ppm is more dangerous than one of 1 ppm, and that benefits will result from the proposed standard. It did not set aside his finding that the number of lives that would be saved was not subject to quantification.

Nor did it question his conclusion that the reduction was "feasible."

In these circumstances, the Secretary's decision was reasonable and in full conformance with the statutory language requiring that he "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U. S. C. § 655 (b) (5). On this record, the Secretary could conclude that regular exposure above the 1 ppm level would pose a definite risk resulting in material impairment to some indeterminate but possibly substantial number of employees. Studies revealed hundreds of deaths attributable to benzene exposure. Expert after expert testified that no safe level of exposure had been shown and that the extent of the risk declined with the exposure level. There was some direct evidence of incidence of leukemia, nonmalignant blood disorders, and chromosomal damage at exposure levels of 10 ppm and below. Moreover, numerous experts testified that existing evidence required an inference that an exposure level above 1 ppm was hazardous. We have stated that "well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be 'substantial evidence' when first-hand evidence on the question . . . is unavailable." *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 464–465 (1972). Nothing in the Act purports to prevent the Secretary from acting when definitive information as to the quantity of a standard's benefits is unavailable.[26] Where, as here, the deficiency in

[26] This is not to say that the Secretary is prohibited from examining relative costs and benefits in the process of setting priorities among hazardous substances, or that systematic consideration of costs and benefits is not to be attempted in the standard-setting process. Efforts to quantify costs and benefits, like statements of reasons generally, may help to promote informed consideration of decisional factors and facilitate

knowledge relates to the extent of the benefits rather than their existence, I see no reason to hold that the Secretary has exceeded his statutory authority.

B

The plurality avoids this conclusion through reasoning that may charitably be described as obscure. According to the plurality, the definition of occupational safety and health standards as those "reasonably necessary or appropriate to provide safe or healthful . . . working conditions" requires the Secretary to show that it is "more likely than not" that the risk he seeks to regulate is a "significant" one. *Ante*, at 653. The plurality does not show how this requirement can be plausibly derived from the "reasonably necessary or appropriate" clause. Indeed, the plurality's reasoning is refuted by the Act's language, structure, and legislative history, and it is foreclosed by every applicable guide to statutory construction. In short, the plurality's standard is a fabrication bearing no connection with the acts or intentions of Congress.

At the outset, it is important to observe that "reasonably necessary or appropriate" clauses are routinely inserted in regulatory legislation, and in the past such clauses have uniformly been interpreted as general provisos that regulatory actions must bear a reasonable relation to those statutory purposes set forth in the statute's substantive provisions. See, *e. g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 796–797 (1978); *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Thorpe*

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judicial review. See *Dunlop* v. *Bachowski*, 421 U. S. 560, 571–574 (1975). The Secretary indicates that he has attempted to quantify costs and benefits in the past. See 43 Fed. Reg. 54354, 54427–54431 (1978) (lead); *id.*, at 27350, 27378–27379 (cotton dust).

It is not necessary in the present litigation to say whether the Secretary must show a reasonable relation between costs and benefits. Discounting for the scientific uncertainty, the Secretary expressly—and reasonably—found such a relation here.

v. *Housing Authority of City of Durham*, 393 U. S. 268, 280–281 (1969). The Court has never—until today—interpreted a "reasonably necessary or appropriate" clause as having a substantive content that supersedes a specific congressional directive embodied in a provision that is focused more particularly on an agency's authority. This principle, of course, reflects the common understanding that the determination of whether regulations are "reasonably necessary" may be made only by reference to the legislative judgment reflected in the statute; it must not be based on a court's own, inevitably subjective view of what steps should be taken to promote perceived statutory goals.

The plurality suggests that under the "reasonably necessary" clause, a workplace is not "unsafe" unless the Secretary is able to convince a reviewing court that a "significant" risk is at issue. *Ante*, at 642. That approach is particularly embarrassing in this case, for it is contradicted by the plain language of the Act. The plurality's interpretation renders utterly superfluous the first sentence of § 655 (b)(5), which, as noted above, requires the Secretary to set the standard "which most adequately assures . . . that no employee will suffer material impairment of health." Indeed, the plurality's interpretation reads that sentence out of the Act. By so doing, the plurality makes the test for standards regulating toxic substances and harmful physical agents substantially identical to the test for standards generally—plainly the opposite of what Congress intended. And it is an odd canon of construction that would insert in a vague and general definitional clause a threshold requirement that overcomes the specific language placed in a standard-setting provision. The most elementary principles of statutory construction demonstrate that precisely the opposite interpretation is appropriate. See, *e. g.*, *FPC* v. *Texaco Inc.*, 417 U. S. 380, 394–395 (1974); *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 488–489 (1947). In short, Congress could have provided that the Secretary may not take regulatory action until the existing

scientific evidence proves the risk at issue to be "significant," [27] but it chose not to do so.

The plurality's interpretation of the "reasonably necessary or appropriate" clause is also conclusively refuted by the legislative history. While the standard-setting provision that the plurality ignores received extensive legislative attention, the definitional clause received *none at all*. An earlier version of the Act, see n. 8, *supra*, did not embody a clear feasibility constraint and was not restricted to toxic substances or to "material" impairments. The "reasonably necessary or appropriate" clause was contained in this prior version of the bill, as it was at all relevant times. In debating this version, Members of Congress repeatedly expressed concern that it would require a risk-free universe. See, *e. g.*, *ante*, at 646–649. The definitional clause was not mentioned at all, an omission that would be incomprehensible if Congress intended

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[27] It is useful to compare the Act with other regulatory statutes in which Congress has required a showing of a relationship between costs and benefits or of an "unreasonable risk." In some statutes Congress has expressly required cost-benefit analysis or a demonstration of some reasonable relation between costs and benefits. See 33 U. S. C. § 701a (Flood Control Act of 1936); 42 U. S. C. § 7545 (c)(2)(B) (1976 ed., Supp. II) (Clean Air Act); 33 U. S. C. § 1314 (b)(4)(B) (1976 ed., Supp. II) (Clean Water Act). In others Congress has imposed two independent requirements: that administrative action be "feasible" and justified by a balancing of costs and benefits, *e. g.*, 43 U. S. C. § 1347 (b) (1976 ed., Supp. II) (Outer Continental Shelf Lands Act); 42 U. S. C. § 6295 (a)(2)(D) (1976 ed., Supp. II) (Energy Policy and Conservation Act). This approach demonstrates a legislative awareness of the difference between a feasibility constraint and a constraint based on weighing costs and benefits. See *infra*, at 719–720. In still others Congress has authorized regulation of "unreasonable risk," a term which has been read by some courts to require a balancing of costs and benefits. See, *e. g.*, *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n*, 569 F. 2d 831 (CA5 1978) (construing 15 U. S. C. § 2058 (c)(2)(A) (Consumer Product Safety Act)); *Forester* v. *Consumer Product Safety Comm'n*, 182 U. S. App. D. C. 153, 559 F. 2d 774 (1977) (construing 15 U. S. C. § 1261 (s) (Child Protection and Toy Safety Act)).

by that clause to require the Secretary to quantify the risk he sought to regulate in order to demonstrate that it was "significant."

The only portions of the legislative history on which the plurality relies, see *ibid.*, have nothing to do with the "reasonably necessary or appropriate" clause from which the "threshold finding" requirement is derived. Those portions consisted of criticisms directed toward the earlier version of the statute *which already contained the definitional clause.* These criticisms, in turn, were met by subsequent amendments that limited application of the strict "no employee will suffer" clause to toxic substances, inserted an explicit feasibility constraint, and modified the word "impairment" by the adjective "material." It is disingenuous at best for the plurality to suggest that isolated statements in the legislative history, expressing concerns that were met by subsequent amendments not requiring any "threshold" finding, can justify reading such a requirement into a "reasonably necessary" clause that was in the Act all along.[28]

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[28] The plurality also relies on its perception that if the "reasonably necessary" clause were not given the meaning it ascribes to it, there would be no guidance for "standards other than those dealing with toxic materials and harmful physical agents." *Ante*, at 640, n. 45. For two reasons this argument is without force. First, even if the "reasonably necessary" clause does have independent content, and even if that content is as the plurality describes it, it cannot under any fairminded reading supersede the express language of § 655 (b) (5) for toxic substances and harmful physical agents.

Second, as noted above, an earlier version of the bill applied the "no employee will suffer" language to all substances. At that time, there was no "gap," and accordingly it could not be argued that the "reasonably necessary or appropriate" clause had the content the plurality ascribes to it. In this light, the plurality's reasoning must be that when Congress amended the bill to apply the strict § 655 (b) (5) requirements only to toxic substances, the definitional clause gained an independent meaning that in turn comprehended all standards. But surely this argument turns congressional purposes on their head. It reasons that when

The plurality's various structural arguments are also unconvincing. The fact that a finding of "grave danger" is required for temporary standards, see *ante*, at 640, n. 45, hardly implies that the Secretary must show for permanent standards that it is more probable than not that the substance to be regulated poses a "significant" risk. Nor is the reference to "*toxic* materials," *ante*, at 643, in any way informative. And the priority-setting provision, *ante*, at 643–644, cannot plausibly be read to condition the Secretary's standard-setting authority on an ability to meet the Court's "threshold" requirement.

The plurality ignores applicable canons of construction, apparently because it finds their existence inconvenient. But as we stated quite recently, the inquiry into statutory purposes should be "informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 11 (1980). Can it honestly be said that the Secretary's interpretation of the Act is "unreasoned" or "unsupportable"? And as we stated in the same case, "safety legislation is to be liberally construed to effectuate the congressional purpose." *Id.*, at 13. The plurality's disregard of these principles gives credence to the frequently voiced criticism that they are honored only when the Court finds itself in substantive agreement with the agency action at issue.

In short, today's decision represents a usurpation of decisionmaking authority that has been exercised by and properly belongs with Congress and its authorized representatives.

Congress singled out toxic substances for special regulation, it simultaneously created a more lenient ("reasonably necessary") test for standards generally, and that once that more lenient test was applicable, it somehow superseded the strict requirements for toxic substances. That reasoning is both illogical and circular. Nor is there any basis for the plurality's suggestion, see *ante*, at 649, n. 54, that the original bill's application to all standards was "entirely inadvertent."

The plurality's construction has no support in the statute's language, structure, or legislative history. The threshold finding that the plurality requires is the plurality's own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

C

The plurality is obviously more interested in the consequences of its decision than in discerning the intention of Congress. But since the language and legislative history of the Act are plain, there is no need for conjecture about the effects of today's decision. "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill*, 437 U. S., at 185. I do not pretend to know whether the test the plurality erects today is, as a matter of policy, preferable to that created by Congress and its delegates: the area is too fraught with scientific uncertainty, and too dependent on considerations of policy, for a court to be able to determine whether it is desirable to require identification of a "significant" risk before allowing an administrative agency to take regulatory action. But in light of the tenor of the plurality opinion, it is necessary to point out that the question is not one-sided, and that Congress' decision to authorize the Secretary to promulgate the regulation at issue here was a reasonable one.

In this case the Secretary found that exposure to benzene at levels above 1 ppm posed a definite albeit unquantifiable risk of chromosomal damage, nonmalignant blood disorders, and leukemia. The existing evidence was sufficient to justify the conclusion that such a risk was presented, but it did not permit even rough quantification of that risk. Discounting for the various scientific uncertainties, the Secretary gave

"careful consideration to the question of whether th[e] substantial costs" of the standard "are justified in light of the hazards of exposure to benzene," and concluded that "these costs are necessary in order to effectuate the statutory purpose . . . and to adequately protect employees from the hazards of exposure to benzene." 43 Fed. Reg. 5941 (1978).

In these circumstances it seems clear that the Secretary found a risk that is "significant" in the sense that the word is normally used. There was some direct evidence of chromosomal damage, nonmalignant blood disorders, and leukemia at exposures at or near 10 ppm and below. In addition, expert after expert testified that the recorded effects of benzene exposure at higher levels justified an inference that an exposure level above 1 ppm was dangerous. The plurality's extraordinarily searching scrutiny of this factual record reveals no basis for a conclusion that quantification is, on the basis of "the best available evidence," possible at the present time. If the Secretary decided to wait until definitive information was available, American workers would be subjected for the indefinite future to a possibly substantial risk of benzene-induced leukemia and other illnesses. It is unsurprising, at least to me, that he concluded that the statute authorized him to take regulatory action now.

Under these circumstances, the plurality's requirement of identification of a "significant" risk will have one of two consequences. If the plurality means to require the Secretary realistically to "quantify" the risk in order to satisfy a court that it is "significant," the record shows that the plurality means to require him to do the impossible. But regulatory inaction has very significant costs of its own. The adoption of such a test would subject American workers to a continuing risk of cancer and other serious diseases; it would disable the Secretary from regulating a wide variety of carcinogens for which quantification simply cannot be undertaken at the present time.

There are encouraging signs that today's decision does not extend that far.[29] My Brother POWELL concludes that the Secretary is not prevented from taking regulatory action "when reasonable quantification cannot be accomplished by any known methods." See *ante*, at 666. The plurality also indicates that it would not prohibit the Secretary from promulgating safety standards when quantification of the benefits is impossible. See *ante*, at 656–657, and n. 63. The Court might thus allow the Secretary to attempt to make a very rough quantification of the risk imposed by a carcinogenic substance, and give considerable deference to his finding that the risk was significant. If so, the Court would permit the Secretary to promulgate precisely the same regulation involved in these cases if he had not relied on a carcinogen "policy," but undertaken a review of the evidence and the

[29] The plurality suggests that it is for the agency "to determine, in the first instance, what it considers to be a 'significant' risk," and that the agency "is free to use conservative assumptions in interpreting the data. . . ." *Ante*, at 655, 656. Moreover, my Brother POWELL would not require "quantification of risk in every case." *Ante*, at 666 (opinion concurring in part and concurring in judgment). As I read his opinion, MR. JUSTICE POWELL would have permitted the Secretary to promulgate the standard at issue here if the Secretary had provided a more carefully reasoned explanation of his conclusion that the risk at issue justified the admittedly significant costs of the benzene standard. MR. JUSTICE POWELL also suggests that such a conclusion would be subject to relatively deferential review. *Ante*, at 670–671, n. 8.

In this respect, the differences between my approach and that of MR. JUSTICE POWELL may be comparatively narrow. We are agreed on two propositions that I regard as critical to a fairminded interpretation of the Act: (1) the Secretary may regulate risks that are not subject to quantification on the basis of the "best available evidence"; and (2) the Secretary's judgment that a particular health risk merits regulatory action is subject to limited judicial scrutiny. It is encouraging that at least five Members of the Court accept these basic propositions.

For reasons stated in the text, however, I disagree with my Brother POWELL's conclusion that it is appropriate to hold in these cases that the Act requires the Secretary to show a reasonable relationship between costs and benefits.

expert testimony and concluded, on the basis of conservative assumptions, that the risk addressed is a significant one. Any other interpretation of the plurality's approach would allow a court to displace the agency's judgment with its own subjective conception of "significance," a duty to be performed without statutory guidance.

The consequences of this second approach would hardly be disastrous; indeed, it differs from my own principally in its assessment of the basis for the Secretary's decision in these cases. It is objectionable, however, for three reasons. First, the requirement of identification of a "significant" risk simply has no relationship to the statute that the Court today purports to construe. Second, if the "threshold finding" requirement means only that the Secretary must find "that there is a need for such a standard," *ante*, at 643, n. 48, the requirement was plainly satisfied by the Secretary's express statement that the standard's costs "are necessary in order to effectuate the statutory purpose . . . and to adequately protect employees from the hazards of exposure to benzene." 43 Fed. Reg. 5941 (1978). Third, the record amply demonstrates that in light of existing scientific knowledge, no purpose would be served by requiring the Secretary to take steps to quantify the risk of exposure to benzene at low levels. Any such quantification would be based not on scientific "knowledge" as that term is normally understood, but on considerations of policy. For carcinogens like benzene, the assumptions on which a dose-response curve must be based are necessarily arbitrary. To require a quantitative showing of a "significant" risk, therefore, would either paralyze the Secretary into inaction or force him to deceive the public by acting on the basis of assumptions that must be considered too speculative to support any realistic assessment of the relevant risk. See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 806 (1979). It is encouraging that the Court appears willing

not to require quantification when it is not fairly possible. See *ante*, at 656–657, and n. 63.

Though it is difficult to see how a future Congress could be any more explicit on the matter than was the Congress that passed the Act in 1970, it is important to remember that today's decision is subject to legislative reversal. Congress may continue to believe that the Secretary should not be prevented from protecting American workers from cancer and other fatal diseases until scientific evidence has progressed to a point where he can convince a federal court that the risk is "significant." Today's decision is objectionable not because it is final, but because it places the burden of legislative inertia on the beneficiaries of the safety and health legislation in question in these cases. By allocating the burden in this fashion, the Court requires the American worker to return to the political arena and to win a victory that he won once before in 1970. I am unable to discern any justification for that result.

D

Since the plurality's construction of the "reasonably necessary or appropriate" clause is unsupportable, I turn to a brief discussion of the other arguments that respondents offer in support of the judgment below.

First, respondents characterize the Act as a pragmatic statute designed to balance the benefits of a safety and health regulation against its costs. Respondents observe that the statute speaks in terms of relative protection by providing that safety must be assured "so far as possible," 29 U. S. C. § 651 (b), and by stating that the "no material impairment" requirement is to be imposed only "to the extent feasible." [30]

[30] Finding obscurity in the word "feasible," my Brother REHNQUIST invokes the nondelegation doctrine, which was last used to invalidate an Act of Congress in 1935. *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). While my Brother REHNQUIST eloquently argues that there remains a place for such a doctrine in our jurisprudence, I am frankly puzzled as to why the issue is thought to be of any relevance

Respondents contend that the term "feasible" should be read to require consideration of the economic burden of a standard, not merely its technological achievability. I do not understand the Secretary to disagree. But respondents present no argument that the expenditure required by the benzene standard is not feasible in that respect. The Secretary concluded on the basis of substantial evidence that the costs of the standard would be readily absorbed by the 20 affected industries. One need not define the feasibility requirement with precision in order to conclude that the benzene standard is "feasible" in the sense that it will not materially harm the financial condition of the regulated industries.

Respondents suggest that the feasibility requirement should be understood not merely to refer to a standard's expense, but also to mandate a finding that the benefits of an occupational safety and health standard bear a reasonable relation

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here. The nondelegation doctrine is designed to assure that the most fundamental decisions will be made by Congress, the elected representatives of the people, rather than by administrators. Some minimal definiteness is therefore required in order for Congress to delegate its authority to administrative agencies.

Congress has been sufficiently definite here. The word "feasible" has a reasonably plain meaning, and its interpretation can be informed by other contexts in which Congress has used it. See n. 27, *supra*. Since the term is placed in the same sentence with the "no employee will suffer" language, it is clear that "feasible" means technologically and economically achievable. Under the Act, the Secretary is afforded considerably more guidance than are other administrators acting under different regulatory statutes. In short, Congress has made "the critical policy decisions" in these cases, see *ante*, at 687 (REHNQUIST, J., concurring in judgment).

The plurality's apparent suggestion, see *ante*, at 646, that the nondelegation doctrine might be violated if the Secretary were permitted to regulate definite but nonquantifiable risks is plainly wrong. Such a statute would be quite definite and would thus raise no constitutional question under *Schechter Poultry*. Moreover, Congress could rationally decide that it would be better to require industry to bear "feasible" costs than to subject American workers to an indeterminate risk of cancer and other fatal diseases.

to its costs. I believe that the statute's language, structure, and legislative history foreclose respondents' position. In its ordinary meaning an activity is "feasible" if it is capable of achievement, not if its benefits outweigh its costs. See Webster's Third New International Dictionary 831 (1976). Moreover, respondents' interpretation would render § 655 (b)(5) internally inconsistent by reading into the term "feasible" a requirement irreconcilable with the express language authorizing the Secretary to set standards assuring that "no employee will suffer material impairment. . . ." Respondents' position would render that language merely hortatory. As noted above, no cost-benefit analysis is referred to at any point in the statute or its legislative history, an omission which cannot be deemed inadvertent in light of the explicit cost-benefit requirements inserted into other regulatory legislation.[31] Finally, the legislative history of the feasibility requirement, see n. 8, *supra*, demonstrates that Congress' sole concern was that standards be economically and technologically achievable. The legislative intent was to prevent the Secretary from materially harming the financial condition of regulated industries in order to eliminate risks of impairment. Congress did not intend to preclude the Secretary from taking regulatory action where, as here, no such threat to industry is posed.[32]

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[31] See n. 27, *supra*.

[32] Congress' antipathy toward cost-benefit balancing is evident throughout the legislative history of the Act. For example:

"The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business. Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." 116 Cong. Rec. 41766 (1970), Leg. Hist. 1150–1151 (Sen. Eagleton).

Similarly, Senator Yarborough stated:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who

In order to decide these cases, however, it is not necessary to resolve the question whether the term "feasible" may contemplate some balancing of the costs and benefits of regulatory action.[33] Taking into account the uncertainties in existing knowledge, the Secretary made an express finding that the hazards of benzene exposure were sufficient to justify the regulation's costs. 43 Fed. Reg. 5941 (1978). Any requirement to balance costs and benefits cannot be read to invalidate this wholly rational conclusion. A contrary result, forcing the Secretary to wait for quantitative data that may not be available in the foreseeable future, would run directly counter to the protective purposes of the Act.[34]

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work in our plants and factories that they will go home after a day's work with their bodies intact. We are talking about assuring our American workers who wo[r]k with deadly chemicals that when they have accumulated a few year's seniority they will not have accumulated lung congestion and poison in their bodies, or something that will strike them down before they reach retirement age." 116 Cong. Rec., at 37625, Leg. Hist. 510.

[33] Nor need I discuss the possibility, raised by counsel for the federal parties in oral argument, that a decision to regulate a substance posing a negligible threat to health and safety could itself be challenged as arbitrary and capricious under the Administrative Procedure Act. See Tr. of Oral Arg. 23.

[34] Respondents also rely on the statutory requirement that the Secretary may act only to prevent "material" impairment. They contend that the standard promulgated here does not fall within that category because the risk is so low. This interpretation derives no support from the statute or its legislative history. The statute itself states that standards should ensure that no employee will suffer "material impairment," not material *risk* of impairment.

The language is consistent with the legislative history. In an early version of the Act, the word "impairment" was modified by "any" rather than "material." See n. 8, *supra*. The feasibility and materiality requirements were added simultaneously as part of an effort to qualify the original language authorizing the Secretary to ensure that "no employee will suffer any impairment of health or functional capacity, or diminished life expectancy." Senator Dominick was concerned that the

Finally, respondents suggest broadly that the Secretary did not fulfill his statutory responsibility to act on the basis of "research, demonstrations, experiments," and to consider "the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws." 29 U. S. C. § 655 (b)(5). Here, they contend, the Secretary based his decision solely on "views and arguments." Brief for Respondents American Petroleum Institute et al. 52. I disagree. The Secretary compiled an extensive record composed of over 50 volumes of exhibits. Most of those exhibits are the reported results of research and demonstrations representing "the latest available scientific data." The Secretary offered a careful discussion of these data in the statement accompanying the permanent standard. His ultimate conclusions were grounded in extensive findings of fact. Where, as here, there are gaps in existing knowledge, the Secretary's decision must necessarily be based on considerations of policy as well as on empirically verifiable facts.

In passing the Occupational Safety and Health Act of 1970, Congress was aware that it was authorizing the Secretary to regulate in areas of scientific uncertainty. But it intended to require stringent regulation even when definitive information was unavailable. In reducing the permissible level of exposure to benzene, the Secretary applied proper legal standards. His determinations are supported by substantial evi-

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phrase "any" impairment would require the Secretary to prevent insect bites. 116 Cong. Rec. 36522 (1970), Leg. Hist. 345.

The respondents' construction would pose an enormous obstacle to efforts to regulate toxic substances under § 655 (b)(5). The probability of contracting cancer will in most contexts be quite small with respect to any particular employee. If the statute were read to authorize the Secretary to act only to assure that "no employee will suffer material risk of impairment," the Secretary would be disabled from regulating substances which poses a small risk with respect to any particular employee but which will nonetheless result in the death of numerous members of the employee pool.

dence. The Secretary's decision was one, then, which the governing legislation authorized him to make.[35]

IV

In recent years there has been increasing recognition that the products of technological development may have harmful effects whose incidence and severity cannot be predicted with certainty. The responsibility to regulate such products has fallen to administrative agencies. Their task is not an enviable one. Frequently no clear causal link can be established between the regulated substance and the harm to be averted. Risks of harm are often uncertain, but inaction has considerable costs of its own. The agency must decide whether to take regulatory action against possibly substantial risks or to wait until more definitive information becomes available—a judg-

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[35] Although the Court of Appeals accepted the Secretary's finding that dermal contact with benzene could cause leukemia, it set aside the dermal contact standard because of the Secretary's failure to perform an experiment recommended by an industry witness. The failure to conduct this test, according to the court, violated the statutory requirement that the Secretary act on the basis of "the best available evidence" and "the latest available scientific data in the field."

In the hearings before the agency, respondents presented no substantial challenge to the position that benzene could be absorbed through the skin, and there was evidence in the record to support that position. Both animal and human studies had found such absorption. In these circumstances, the Secretary was not obligated to undertake additional studies simply because a witness testified that such studies would be informative. The imposition of such a requirement would paralyze the standard-setting process. The Secretary's mandate is to act on the basis of "available" evidence, not evidence which may become available in the future.

In setting aside the dermal contact standard, the Court of Appeals also relied on its conclusion that the Secretary had not shown that quantifiable benefits would result from the standard. As the discussion above indicates, the court applied incorrect legal standards in so holding.

ment which by its very nature cannot be based solely on determinations of fact.[36]

Those delegations, in turn, have been made on the understanding that judicial review would be available to ensure that the agency's determinations are supported by substantial evidence and that its actions do not exceed the limits set by Congress. In the Occupational Safety and Health Act, Congress expressed confidence that the courts would carry out this important responsibility. But in these cases the plurality has far exceeded its authority. The plurality's "threshold finding" requirement is nowhere to be found in the Act and is antithetical to its basic purposes. "The fundamental policy questions appropriately resolved in Congress . . . are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S., at 558 (emphasis in original). Surely this is no less true of the decision to ensure safety for the American worker than the decision to proceed with nuclear power. See *ibid.*

Because the approach taken by the plurality is so plainly irreconcilable with the Court's proper institutional role, I am certain that it will not stand the test of time. In all likelihood, today's decision will come to be regarded as an extreme reaction to a regulatory scheme that, as the Members of the plurality perceived it, imposed an unduly harsh burden on regulated industries. But as the Constitution "does not enact Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting), so the responsibility to scrutinize federal administrative action does not authorize this Court to strike its own balance between the

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[36] See W. Lowrance, Of Acceptable Risk: Science and the Determination of Safety (1976); Stewart, Paradoxes of Liberty, Integrity and Fraternity: The Collective Nature of Environmental Quality and Judicial Review of Administrative Action, 7 Environ. L. 463, 469–472 (1977).

costs and benefits of occupational safety standards. I am confident that the approach taken by the plurality today, like that in *Lochner* itself, will eventually be abandoned, and that the representative branches of government will once again be allowed to determine the level of safety and health protection to be accorded to the American worker.

HAMMETT *v.* TEXAS

ON MOTION TO WITHDRAW PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79–5050. Decided July 2, 1980

Petitioner's unopposed motion to withdraw a petition for certiorari filed by his attorney seeking review of petitioner's murder conviction and death sentence is granted under this Court's Rule 60, where there is no issue as to petitioner's competence. Such withdrawal does not foreclose an application for collateral relief.

Motion granted. Reported below: 578 S. W. 2d 699.

PER CURIAM.

William Jack Hammett, the petitioner in this case, has been convicted of murder and sentenced to death. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals, 578 S. W. 2d 699 (1979). The petitioner states, and his attorney does not deny, that he informed his counsel that he did not wish to pursue any further appeals in his case. Nevertheless, counsel filed a petition requesting review by this Court.

Petitioner now moves for dismissal of the petition, stating under oath that he "made this decision voluntarily and with full knowledge of the consequences, only after due consideration of all facts and circumstances regarding the case." Affidavit of June 3, 1980. Under Rule 60 of the Rules of the Supreme Court (1970), a petitioner or appellant may withdraw a petition or appeal. In response to this motion, petitioner's counsel does not question petitioner's competence. The State of Texas does not oppose petitioner's motion. In the absence of any issue as to petitioner's competence to withdraw the petition filed against his will, there is no basis under Rule 60 for denying this motion. See *Gilmore* v. *Utah*, 429 U. S. 1012, 1014 (1976) (BURGER, C. J., concurring). Moreover, withdrawal of the petition will not foreclose an ap-

propriate application for collateral relief. Accordingly, the motion to withdraw the petition is granted.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today permits petitioner, a prisoner acting *pro se*, to take the first step towards enforcement of his death sentence by withdrawing the petition for writ of certiorari filed on his behalf by his appointed counsel. I continue to adhere to my view that the death penalty is unconstitutional under all circumstances, and accordingly I dissent. In addition, however, the present decision is indefensible even under the more restrictive view of the Eighth Amendment taken by a majority of my Brethren.

The Court takes its action today despite the fact that we have already granted certiorari in a similar case to determine whether the Constitution is violated by the manner in which the State of Texas acquires psychiatric testimony introduced at the punishment phase of the trial to obtain a jury verdict setting the punishment at death. *Estelle* v. *Smith*, 445 U. S. 926 (1980). The United States Court of Appeals for the Fifth Circuit has already held that the established pattern of conduct by which the State of Texas obtains the testimony necessary to send a defendant to his death violates the Fifth, Sixth, and Fourteenth Amendments. *Smith* v. *Estelle*, 602 F. 2d 694 (1979). Thus the Court today acquiesces in the petitioner's apparent decision to be executed despite the fact that we may hold next Term that the death penalty cannot be enforced in cases such as this one. I do not believe that a defendant may by his consent permit a State to impose a punishment forbidden by the Constitution; "the procedure the Court approves today amounts to nothing less than state-administered suicide." *Lenhard* v. *Wolff*, 444 U. S. 807, 815 (1979) (MARSHALL, J., dissenting).

I

A few facts about this case must be briefly stated in order to place the present motion in its proper context. Petitioner was originally tried for capital murder in the spring of 1977. Although the jury found the defendant guilty of capital murder, a mistrial was declared after the jury was unable to agree on the punishment during the sentencing phase of the trial. See 578 S. W. 2d 699, 706 (Tex. Crim. App. 1979). The second trial was held in the fall of 1977, and petitioner was again found guilty of capital murder. The jury answered the requisite questions in the affirmative, and the punishment was therefore assessed at death.[1]

The Texas Court of Criminal Appeals initially reversed the judgment of the trial court. See App. to Pet. for Cert., Exhibit A. The Court of Criminal Appeals concluded that it was error to deny petitioner's motion for appointment of a psychologist to examine petitioner for the purpose of testifying on his behalf concerning the probability that petitioner would commit future criminal acts of violence.[2] On the

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[1] By state statute the jury in a capital case in Texas must decide three questions:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071 (b) (Vernon Supp. 1979). An affirmative answer to each question must be unanimous, and if all three questions are answered affirmatively then the death penalty "shall" be imposed. Tex. Code Crim. Proc. Ann., Arts. 37.071 (d) (1) and (e) (Vernon Supp. 1979).

[2] The Texas Court of Criminal Appeals reasoned:

"Those who face an accusation of being likely to commit criminal acts of violence that will constitute a continuing threat to society face a pecu-

State's motion for rehearing, however, that opinion was withdrawn and the court affirmed the conviction and sentence. 578 S. W. 2d 699 (1979). The court concluded that petitioner's motion for appointment of a defense psychologist had been made too late.

The central issue raised by the petition for certiorari in this case concerns the use of psychiatric testimony during the punishment stage of a Texas capital case.[3] Prior to the first trial, the court appointed Dr. Bill W. Henry, a psychiatrist, to examine petitioner to determine his mental competency to stand trial. Dr. Henry filed two written reports with the court, based on two interviews with petitioner, concluding that the defendant was competent to stand trial. Counsel apparently was not present at either interview. Cf. *id.*, at

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liarly unique charge with ominous consequences. In this jurisdiction the use of the expert opinion testimony of those in the behavioral sciences has frequently been resorted to by the prosecution, and this Court has consistently approved such use, often basing the sufficiency of the evidence to support a death-producing verdict on that evidence. . . . Given the role such evidence has come to play, the unique character of the issue, the extreme consequences that rest on resolution of the issue, and the tremendous diversity of opinions on such matters within the field of experts that may qualify to give such evidence on the issue, it cannot be denied that for accused persons facing the possibility of death, expert behavioral witnesses for the defense are necessities, not luxuries." App. to Pet. for Cert., Exhibit A, pp. 3–4.

See also 578 S. W. 2d 699, 720–721 (Tex. Crim. App. 1979) (Odom, J., concurring).

[3] In the Texas Court of Criminal Appeals petitioner argued, *inter alia*, that "the trial court erred in allowing a psychiatrist who was appointed to examine the [defendant] with respect to his competency to stand trial to testify at the punishment phase of the trial." *Id.*, at 705. A similar argument is made in the petition for certiorari. See, *e. g.*, Pet. for Cert. 6–7: "[T]he circumstances surrounding the State's presentation of Dr. Henry's testimony at the punishment stage of trial was grossly unfair and the defendant was thus denied due process of law," citing *Smith* v. *Estelle*, 445 F. Supp. 647 (ND Tex. 1977). See also Pet. for Cert. 14–16, 17–18.

705. No issue of competency was raised during the guilt phase of either of petitioner's trials.

At the punishment stage of each trial, however, the State was permitted to call Dr. Henry as an expert witness. The State examined Dr. Henry on whether there was a probability that the petitioner would commit criminal acts of violence in the future that would constitute a continuing threat to society. That issue is, of course, one of the statutorily required questions which must be presented to the jury in the sentencing phase of a Texas capital case; if the jury finds beyond a reasonable doubt that such a probability of future violent crime exists, in addition to the other statutorily mandated findings, then the death penalty must be imposed.[4] Based on the pretrial psychiatric examinations which were supposedly limited to the question whether the petitioner was legally competent to stand trial, Dr. Henry testified that the defendant was a "person suffering of an antisocial personality," *id.*, at 706, and that petitioner would probably commit criminal acts of violence in the future.

II

It has become clear that the scenario just described constitutes a customary pattern of conduct by the authorities in Texas capital cases. This is by no means the first time that a pretrial examination allegedly sought only to ascertain the defendant's competence to stand trial has been used as the basis for punishment-stage testimony by the court-appointed psychiatrist that the defendant has an antisocial personality and is likely to commit future violent crimes. The cases in the Texas Court of Criminal Appeals reflecting this pattern of official conduct are legion. See, *e. g.*, *Wilder* v. *State*, 583 S. W. 2d 349 (1979), cert. pending, No. 79–5002; *Armour* v. *State*, 583 S. W. 2d 349 (1979), cert. pending, No. 79–5007; *Bell* v. *State*, 582 S. W. 2d 800 (1979), cert. pend-

[4] See n. 1, *supra*.

ing, No. 79–5199; *Garcia* v. *State*, 581 S. W. 2d 168 (1979), cert. pending, No. 79–5464; *Woods* v. *State*, 569 S. W. 2d 901 (1978), cert. pending, No. 79–721; *Livingston* v. *State*, 542 S. W. 2d 655 (1976), cert. denied, 431 U. S. 933 (1979); *Gholson* v. *State*, 542 S. W. 2d 395 (1976), cert. denied, 432 U. S. 911 (1977); *Smith* v. *State*, 540 S. W. 2d 693 (1976), cert. denied, 430 U. S. 922 (1977), death penalty vacated, *Smith* v. *Estelle*, 445 F. Supp. 647 (ND Tex. 1977), aff'd, 602 F. 2d 694 (CA5 1979), cert. granted, 445 U. S. 926 (1980); *Hurd* v. *State*, 513 S. W. 2d 936 (1974); *Armstrong* v. *State*, 502 S. W. 2d 731 (1973). The use at the punishment stage of testimony by the psychiatrist appointed by the court to establish the defendant's competency to stand trial has the official sanction of the Texas Court of Criminal Appeals. See *Armour* v. *State*, *supra*; *Livingston* v. *State*, *supra*; *Gholson* v. *State*, *supra*.

The United States Court of Appeals for the Fifth Circuit has concluded that this practice violates the Fifth and Sixth Amendments as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. See *Smith* v. *Estelle*, 602 F. 2d 694 (1979), aff'g 445 F. Supp. 647 (ND Tex. 1977). The Court of Appeals held that "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial," 602 F. 2d, at 708, that the defendant must be warned that he has the right to remain silent, and that if a defendant indicates that he wishes to remain silent he may not be questioned by the psychiatrist to determine future dangerousness, *ibid.*[5] That court also found that

[5] In the instant case there is evidence that in fact petitioner did not want to cooperate with Dr. Henry during the interview. See 578 S. W. 2d, at 705; Brief in Opposition 4.

The State's response to the petition for certiorari alleges that Dr. Henry informed petitioner of his right not to participate and that the psychiatrist terminated the first interview after petitioner chose not to continue. *Ibid.* Even if that was the case, it does not necessarily mean that the

whether to submit to a pretrial psychiatric examination in a Texas capital case "is a vitally important decision, literally a life or death matter," *ibid.* The examination is therefore a critical stage in the prosecution, and the defendant is entitled to the assistance of counsel under the Sixth Amendment. *Id.*, at 708–709.

Because of the seriousness of the issues raised and the conflict between the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit, we have already granted certiorari in *Estelle* v. *Smith*, 445 U. S. 926 (1980). Should this Court agree with the federal court, the death penalty imposed on petitioner in the instant case would have to be reconsidered because of the manner in which the crucial psychiatric testimony against him was obtained.

Nevertheless, the Court today permits petitioner, acting *pro se*, to withdraw his petition for certiorari, thereby setting in motion the steps by which the defendant may be put to death by the State of Texas.[6] It appears that petitioner does not intend to prosecute any challenge to his conviction and sentence;[7] petitioner asks this Court to permit

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procedure used in this case complies with the constitutional requirements discussed by the Court of Appeals in *Smith* v. *Estelle*, and, of course, when this Court reviews that decision we may conclude that the Court of Appeals took an overly narrow view of the constitutional requirements. If this Court affirms the judgment of the Court of Appeals in *Estelle* v. *Smith*, cert. granted, 445 U. S. 926 (1980), at the very least the procedure by which Dr. Henry obtained the information from petitioner from which the psychiatrist derived his testimony would have to be closely scrutinized to see if it satisfied constitutional demands.

[6] According to the State of Texas, if the petition for writ of certiorari is dismissed by this Court, the mandate would then issue from the Texas Court of Criminal Appeals to the trial court. Petitioner would then be formally sentenced to be executed on a date 30 days or more from the date of sentencing. Response to Motion to Dismiss 3. See also Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 1979).

[7] Petitioner states that "I no longer wish to appeal (or challenge) my conviction in this case." Motion to Dismiss 1. He also asks this Court

him to withdraw his petition for certiorari "so that the [death] sentence may be carried out." Motion to Dismiss 2. Petitioner in effect seeks to waive a challenge to his execution,[8] despite the fact that the issue of the constitutionality of the practice by which he was sentenced to die is presently pending before this Court. In my judgment, there can be no such waiver. See *Lenhard* v. *Wolff*, 444 U. S., at 810 (MARSHALL, J., dissenting); *Gilmore* v. *Utah*, 429 U. S. 1012, 1019 (1976) (MARSHALL, J., dissenting).

In *Gilmore*, MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and myself, asserted that "the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment." *Id.*, at 1018 (dissenting opinion). In a separate dissenting opinion, I expressed the view that "the Eighth Amendment not only protects the rights of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments." *Id.*, at 1019 (MARSHALL, J., dissenting). "Society is not powerless . . . to resist a defendant's effort to prompt the exercise of capital force," *Lenhard* v. *Wolff*, *supra*, at 812 (MARSHALL, J., dissenting). The defendant has no right to "state-administered suicide." 444 U. S., at 815.

"to set aside this writ and issue an order so stating to the state court so that the sentence may be carried out." *Id.*, at 2.

[8] It is questionable whether petitioner fully understands what he is seeking to waive. In his papers petitioner "moves the Court to dismiss the Appal [*sic*] or Habeas Corpus Application," *id.*, at 1. He does not appear to know whether his appointed attorney filed a petition for certiorari, an appeal, or a habeas corpus application. *Ibid.* It is certainly possible that petitioner has reached his present decision without full knowledge or understanding of the Court of Appeals decision in *Smith* v. *Estelle*, our grant of certiorari to review that decision, or the effect that *Estelle* v. *Smith* may have on his sentence of death. Cf. *Gilmore* v. *Utah*, 429 U. S. 1012, 1019 (1976) (MARSHALL, J., dissenting).

These observations have no less force because here the imposition of the death penalty under these circumstances may be held by a majority of my Brethren to violate the Fifth and Sixth Amendments rather than the Eighth Amendment. Indeed, these views have added force in this case because the procedure employed by the State has been successfully challenged on constitutional grounds in federal court, and the issue of the constitutionality of the manner in which the State obtains the psychiatric testimony necessary to convince the jury that the defendant will probably commit acts of criminal violence in the future is presently pending before this Court. Cf. *Gilmore* v. *Utah*, 429 U. S., at 1018 (WHITE, J., dissenting); *id.*, at 1019 (MARSHALL, J., dissenting); *Lenhard* v. *Wolff*, *supra*, at 811–812, n. 3 (MARSHALL, J., dissenting).

If this Court agrees with the Court of Appeals in *Estelle* v. *Smith*, then the death penalty imposed on petitioner in the present case must be reconsidered. Under these circumstances I cannot accept the Court's decision to permit the petitioner to withdraw his petition for certiorari and thereby run the risk that the State of Texas will take a life which it is constitutionally prohibited from taking. I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I would not grant this *pro se* application summarily, but would set it for plenary consideration upon briefs and arguments submitted by petitioner's appointed counsel and the State. See *Gilmore* v. *Utah*, 429 U. S. 1012, 1020 (1976) (dissenting opinion).

Reporter's Note

The next page is purposely numbered 901. The numbers between 733 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 26 THROUGH SEPTEMBER 18, 1980

JUNE 26, 1980

Dismissal Under Rule 60

No. 79–1852. BLUE CROSS OF NORTHWEST OHIO *v.* JUMP, SUPERINTENDENT OF INSURANCE. Sup. Ct. Ohio. Certiorari dismissed under this Court's Rule 60. Reported below: 61 Ohio St. 2d 246, 400 N. E. 2d 892.

JUNE 30, 1980

Affirmed on Appeal

No. 79–1436. MINNESOTA ET AL. *v.* PLANNED PARENTHOOD OF MINNESOTA. Affirmed on appeal from C. A. 8th Cir. MR. CHIEF JUSTICE BURGER, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 612 F. 2d 359.

Appeal Dismissed

No. 79–1027. KING, GOVERNOR OF MASSACHUSETTS, ET AL. *v.* PRETERM, INC., ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. MR. JUSTICE REHNQUIST, being of the view that the order of the Court of Appeals "amending its mandate" to embrace the invalidation of an entirely separate statute is not governed by *FTC* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), dissents from dismissal of the appeal and would note probable jurisdiction and set case for oral argument. Reported below: 591 F. 2d 121.

Certiorari Granted—Reversed and Remanded. (See No. 79–622, *ante*, p. 444.)

Certiorari Granted—Vacated and Remanded. (See also No. 79–448, *ante*, p. 438.)

No. 79–393. UNITED STATES *v.* CONWAY. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Salvucci*, *ante*, p. 83, and *Rawlings* v. *Kentucky*, *ante*, p. 98. Reported below: 595 F. 2d 1157.

No. 78–1902. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* CONSOLIDATED EXPRESS, INC., ET AL.;

No. 78–1905. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* CONSOLIDATED EXPRESS, INC., ET AL.; and

No. 79–221. CONSOLIDATED EXPRESS, INC., ET AL. *v.* NEW YORK SHIPPING ASSN., INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *NLRB* v. *Longshoremen*, 447 U. S. 490 (1980). Reported below: 602 F. 2d 494.

No. 79–809. GRASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Walter* v. *United States*, 447 U. S. 649 (1980). Reported below: 602 F. 2d 1192.

No. 79–921. OHIO *v.* SMITH. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ohio* v. *Roberts*, *ante*, p. 56. MR. JUSTICE STEWART and MR. JUSTICE STEVENS dissent. Reported below: 58 Ohio St. 2d 344, 390 N. E. 2d 778.

No. 79–1242. TIFFANY CONSTRUCTION CO., INC. *v.* BUREAU OF REVENUE OF NEW MEXICO. Ct. App. N. M. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White Mountain Apache Tribe* v. *Bracker*, *ante*, p. 136, and *Central Machinery Co.* v. *Arizona Tax Comm'n*, *ante*, p. 160. Reported below: 93 N. M. 593, 603 P. 2d 332.

No. 79–1481. UNITED STATES *v.* DICKINSON ET AL. C. A. 2d Cir. Motions of respondents Dickinson and Montanino for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Salvucci, ante,* p. 83. Reported below: 615 F. 2d 1351.

No. 79–1677. CALIFORNIA *v.* VELASQUEZ. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Adams* v. *Texas, ante,* p. 38. Reported below: 26 Cal. 3d 425, 606 P. 2d 341.

No. 79–5026. WILLIAMSON *v.* ALABAMA;
No. 79–5301. WILSON *v.* ALABAMA;
No. 79–5458. HORSLEY *v.* ALABAMA;
No. 79–5525. CADE *v.* ALABAMA;
No. 79–5563. BALDWIN *v.* ALABAMA;
No. 79–5709. THOMAS *v.* ALABAMA;
No. 79–5741. RITTER *v.* ALABAMA; and
No. 79–5835. MACK *v.* ALABAMA. Sup. Ct. Ala. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Beck* v. *Alabama,* 447 U. S. 625 (1980). Reported below: No. 79–5026, 370 So. 2d 1066; No. 79–5301, 371 So. 2d 943; No. 79–5458, 374 So. 2d 375; No. 79–5525, 375 So. 2d 828; No. 79–5563, 372 So. 2d 32; No. 79–5709, 373 So. 2d 1167; No. 79–5741, 375 So. 2d 270; No. 79–5835, 375 So. 2d 504.

No. 79–5804. BURROUGHS *v.* GEORGIA. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Vitale,* 447 U. S. 410 (1980). Reported below: 244 Ga. 288, 260 S. E. 2d 5.

No. 79-6150. MATHEWS *v.* OHIO. Ct. App. Ohio, Licking County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Vitale*, 447 U. S. 410 (1980).

No. 79-6190. CRAWFORD *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama*, 447 U. S. 625 (1980), and *United States* v. *Henry*, 447 U. S. 264 (1980). Reported below: 377 So. 2d 159.

Miscellaneous Orders

No. A-1060. CRAIG *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. (FORD MOTOR CO. ET AL., REAL PARTIES IN INTEREST). Application for stay of trial court proceedings, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1074. BLUE *v.* SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR. Application for stay of the order of the Supreme Court of Virginia, dated April 18, 1980, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1093. SILO *v.* KELLY, WARDEN, ET AL. Application for stay of trial court proceedings, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-1167. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* POTTS ET AL. Application to vacate the order dated June 28, 1980, of the United States Court of Appeals for the Fifth Circuit and for other relief, addressed to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 85, Orig. TEXAS *v.* OKLAHOMA. It is ordered that John A. Carver, Jr., Esquire, of Denver, Colo., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 444 U. S. 1065.]

No. A–1134. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. (No. 79–1404); MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL. (No. 79–1408); PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL. (No. 79–1414); COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL. (No. 79–1415); and PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. (No. 79–1489). C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of petitioner in No. 79–1489 for stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is

denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would deny the motion.

No. 79–1989. CITIZENS PARTY ET AL. *v.* MANCHIN, SECRETARY OF STATE OF WEST VIRGINIA. Sup. Ct. App. W. Va. Motion of appellants to expedite consideration of the appeal and for emergency relief denied.

Certiorari Granted

No. 79–395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 529.

Certiorari Denied

No. 79–297. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF NEW JERSEY, ET AL. *v.* ROSS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 598 F. 2d 1312.

No. 79–375. WHITMIRE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1303.

No. 79–1035. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 79–1036. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 79–1099. TIDEWATER MOTOR TRUCK ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 79–1109. HOUFF TRANSFER, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.; and

No. 79–1110. DOLPHIN FORWARDING, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 157, 613 F. 2d 890.

No. 79–64. ZBARAZ ET AL. *v.* MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 196.

No. 79–1460. NATIONAL VAN LINES, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 239, 613 F. 2d 972.

No. 79–5179. TRACY ET AL. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. Pa. Commw. Ct. Certiorari denied. Reported below: 40 Pa. Commw. 186, 396 A. 2d 913.

No. 79–6128. SMITH *v.* HARTMAN, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5533. BURKS *v.* TEXAS. Ct. Crim. App. Tex.;

No. 79–6099. STARVAGGI *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 79–6350. BARFIELD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 79–5533, 583 S. W. 2d 389; No. 79–6099, 593 S. W. 2d 323; No. 79–6350, 298 N. C. 306, 259 S. E. 2d 510.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 65, Orig. TEXAS *v.* NEW MEXICO, 446 U. S. 540; and

No. 78–1522. ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH, 446 U. S. 500. Petitions for rehearing denied.

No. 78–1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL., 446 U. S. 359;

No. 78–1821. UNITED STATES *v.* MENDENHALL, 446 U. S. 544;

No. 79–1434. MANDEL ET AL. *v.* NEW YORK, 446 U. S. 949;

No. 79–6152. HAYES *v.* VALLEY BANK OF NEVADA; and HAYES *v.* GLADSTONE ET AL., 446 U. S. 902;

No. 79–6237. RODRIGUES *v.* CITY OF SPARKS, NEVADA, ET AL., 446 U. S. 931; and

No. 79–6261. JAFFER *v.* CITY OF MIAMI ET AL., 446 U. S. 931. Petitions for rehearing denied.

No. 79–6108. ARMOUR ET AL. *v.* NIX ET AL., 446 U. S. 930. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

JULY 2, 1980

Dismissal Under Rule 60. (See No. 79–5050, *ante*, p. 725.)

Vacated and Remanded on Appeal

No. 78–1107. ARMISTEAD ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1108. CITY OF LOS ANGELES ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1114. LOS ANGELES COUNTY ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1382. KLUTZNICK, SECRETARY OF COMMERCE *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.; and

No. 78–1442. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, LOS ANGELES BRANCH *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL. Appeals from D. C. C. D. Cal. Judgment vacated and cases remanded for further consideration in light of *Fullilove* v. *Klutznick*, *ante*, p. 448. MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS would affirm the judgment. Reported below: 459 F. Supp. 766.

Miscellaneous Orders

No. A–1135. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. Application for stay of the preliminary injunction entered by the United States District Court for the Northern District of Illinois on June 9, 1980, denied. MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE REHNQUIST would grant the application. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A–1168. KLUTZNICK, SECRETARY OF COMMERCE, ET AL. *v.* CONTROL DATA CORP. ET AL. Application of the Solicitor General to vacate the order of the United States Court of Appeals for the District of Columbia Circuit, entered June 24, 1980, granted. MR. JUSTICE BRENNAN dissents. MR. CHIEF JUSTICE BURGER, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS took no part in the consideration or decision of this application.

Probable Jurisdiction Noted

No. 79–1631. DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA ET AL. *v.* WISCONSIN EX REL. LA FOLLETTE ET AL. Appeal from Sup. Ct. Wis. Probable jurisdiction noted. The judgment of the Supreme Court of Wisconsin, filed January 19, 1980, is stayed pending the issuance of the mandate of this Court. Reported below: 93 Wis. 2d 473, 287 N. W. 2d 519.

Certiorari Granted. (See also No. 79–243, *ante*, p. 555.)

No. 78–918. REPUBLIC STEEL CORP. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL.; and

No. 78–919. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. 3d Cir. Motion of American Petroleum Institute et al. for leave to file a brief as *amici curiae* in No. 78–919 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 577 F. 2d 825.

No. 79–1213. MINNICK ET AL. *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 95 Cal. App. 3d 506, 157 Cal. Rptr. 260.

No. 79–1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 604 F. 2d 504.

No. 79–1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 611 F. 2d 754.

Certiorari Denied

No. 79–489. MEROLA *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL.; and

No. 79–561. NEW YORK NEWS, INC. *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 47 N. Y. 2d 985, 393 N. E. 2d 1038.

Rehearing Denied

No. 79–901. OHIO *v.* KORN, 445 U. S. 911;

No. 79–1216. SYROVATKA ET UX. *v.* EHRLICH, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF NEBRASKA, ET AL., 446 U. S. 935;

No. 79–1297. VICTORSON ET AL. *v.* UNITED STATES, 446 U. S. 936;

No. 79–6145. LEE *v.* GARRISON, WARDEN, ET AL., 446 U. S. 967;

No. 79–6175. HOLMES v. FLORIDA, 446 U. S. 913;

No. 79–6262. JAFFER *v.* ONGIE, CLERK, CITY OF MIAMI, 446 U. S. 943; and

No. 79–6354. PICKING *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL., 446 U. S. 944. Petitions for rehearing denied.

No. 78–986. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL., 444 U. S. 878. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 79–1428. A. H. ROBINS CO., INC., ET AL. *v.* ROSS ET AL., 446 U. S. 946. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

JULY 11, 1980

Dismissal Under Rule 53

No. 79–1665. PIPER AIRCRAFT CORP. *v.* DAVIS, EXECUTOR. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 615 F. 2d 606.

JULY 14, 1980

Dismissal Under Rule 53

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. C. A. 3d Cir. Certiorari dismissed as to petitioner Vogt under this Court's Rule 53. Reported below: 616 F. 2d 1238.

AUGUST 11, 1980

Rehearing Denied

No. 78–630. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL., 447 U. S. 134;

No. 78–1729. UNITED STATES *v.* PAYNER, 447 U. S. 727;

No. 79–305. UNITED STATES *v.* HAVENS, 446 U. S. 620;

No. 79–421. BRYANT ET AL. *v.* YELLEN ET AL., 447 U. S. 352;

No. 79–425. CALIFORNIA ET AL. *v.* YELLEN ET AL., 447 U. S. 352;

No. 79–435. IMPERIAL IRRIGATION DISTRICT ET AL. *v.* YELLEN ET AL., 447 U. S. 352; and

No. 79–1101. CATALANO, INC., ET AL. *v.* TARGET SALES, INC., ET AL., 446 U. S. 643. Petitions for rehearing denied.

No. 79–1136. BROWN & ROOT, INC., ET AL. *v.* JOYNER ET AL., 446 U. S. 981;

No. 79–1175. WM. T. BURNETT & CO., INC. *v.* GENERAL TIRE & RUBBER CO., 446 U. S. 951;

No. 79–1228. IVY ET AL. *v.* SECURITY BARGE LINES, INC., 446 U. S. 956;

No. 79–1294. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSARIO ET AL., 446 U. S. 651;

No. 79–1377. ANDERSON, WARDEN *v.* CHARLES, 447 U. S. 404;

No. 79–1433. MASKENY ET AL. *v.* UNITED STATES, 447 U. S. 921;

No. 79–1506. LAGUTA ET AL. *v.* OHIO, 446 U. S. 952;

No. 79–1549. GEECK ET AL. *v.* CITY OF NEW ORLEANS ET AL., 446 U. S. 961;

No. 79–1627. GREEN V. COUNTY OF ALAMEDA ET AL., 446 U. S. 984;

No. 79–1671. WARNER ET AL. *v.* SOVEREIGN NEWS CO. ET AL., 447 U. S. 923;

No. 79–5921. BLAKE *v.* GEORGIA, 446 U. S. 988;

No. 79–5954. RUBIES ET AL. *v.* UNITED STATES, 446 U. S. 940;

No. 79–5975. BOWEN *v.* GEORGIA, 446 U. S. 970;

No. 79–5996. PEERY *v.* SIELAFF, CORRECTIONS DIRECTOR, ET AL., 446 U. S. 940;

No. 79–6055. HEITMAN *v.* MISSOURI, 446 U. S. 941;

No. 79–6188. MOORE *v.* ZANT, WARDEN, 446 U. S. 947;

No. 79–6196. GEROMETTE *v.* GENERAL MOTORS CORP., 446 U. S. 985;

No. 79–6209. STANLEY ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, 447 U. S. 925;

No. 79–6248. MA *v.* HAZELWOOD ET AL., 446 U. S. 942; and

No. 79–6250. GRAY *v.* MISSISSIPPI, 446 U. S. 988. Petitions for rehearing denied.

No. 79–6298. DIOQUINO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., 446 U. S. 944;

No. 79–6314. IRVIN *v.* NANNI ET AL., 446 U. S. 985;

No. 79–6356. HOP-WAH, AKA GREEN *v.* HOPPER, WARDEN, 446 U. S. 968;

No. 79–6404. CROOKER *v.* U. S. DEPARTMENT OF JUSTICE, 447 U. S. 908;

No. 79–6405. DAVIS *v.* NEW YORK, 446 U. S. 986;

No. 79–6412. MUINA *v.* DEPARTMENT OF PROFESSIONAL LICENSING OF MONTANA ET AL., 446 U. S. 981;

No. 79–6422. BURGER *v.* GEORGIA, 446 U. S. 988;

No. 79–6443. PROFIT *v.* CITY OF NIAGARA FALLS, NEW YORK, ET AL., 447 U. S. 901;

No. 79–6450. YOUNG *v.* BALTIMORE COUNTY BOARD OF EDUCATION ET AL., 446 U. S. 955;

No. 79–6457. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES, 447 U. S. 909;

No. 79–6470. FRANKLIN *v.* GEORGIA, 447 U. S. 930;

No. 79–6487. CRISAFI *v.* WIETHE, 447 U. S. 927;

No. 79–6488. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL., 447 U. S. 928;

No. 79–6494. GINSBURG *v.* TIGHE, 447 U. S. 910;

No. 79–6540. PROFFITT *v.* UNITED STATES, 447 U. S. 910;

No. 79–6551. SMILEY *v.* CORCORAN, LOS ANGELES COUNTY CLERK, ET AL., 447 U. S. 910;

No. 79–6594. RUCKER *v.* CITY OF SAINT LOUIS ET AL., 447 U. S. 910;

No. 79–6605. WESTOVER *v.* UNITED STATES, 447 U. S. 929; and

No. 79–6614. DOBBS *v.* HOPPER, WARDEN, 447 U. S. 930. Petitions for rehearing denied.

No. 79–912. HANRAHAN ET AL. *v.* HAMPTON ET AL., 446 U. S. 754; and

No. 79–914. JOHNSON ET AL. *v.* HAMPTON ET AL., 446 U. S. 754. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–1553. COLEMAN *v.* MONTANA, 446 U. S. 970. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 79–5575. JAGNANDAN ET AL. *v.* MISSISSIPPI STATE UNIVERSITY ET AL., 444 U. S. 1026. Motion for leave to file a petition for rehearing denied.

AUGUST 13, 1980

Dismissal Under Rule 53

No. 79–6885. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 615 F. 2d 917.

AUGUST 15, 1980

Miscellaneous Order

No. 80–182. CELEBREZZE, SECRETARY OF STATE OF OHIO *v.* ANDERSON ET AL. C. A. 6th Cir. Motion to expedite consideration of the petition for writ of certiorari denied without prejudice to its later renewal. MR. JUSTICE POWELL and MR. JUSTICE STEVENS would grant the motion.

AUGUST 20, 1980

Dismissal Under Rule 53

No. 79–1908. LEE VISION CENTER, INC. *v.* VAUGHT. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 613 F. 2d 313.

AUGUST 22, 1980

Dismissal Under Rule 53

No. 79–1654. AMBOOK ENTERPRISES, AKA AMERICAN BOOK CLUB *v.* TIME INC. ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 612 F. 2d 604.

Miscellaneous Orders

No. A–1101. SAYLES *v.* HART, U. S. DISTRICT JUDGE. Application to vacate the order of the United States Court of Appeals for the District of Columbia Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–1138. HOMEOWNER'S ENTERPRISES, INC. *v.* THOMPSON ET AL. Application for stay of trial proceedings, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–1154. WOOD, DBA NATIONAL PHOTO SERVICES *v.* CHACE COMPANY ADVERTISING, INC., ET AL. Application for recall and stay of the mandate of the United States Court of Appeals for the Ninth Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–1160. PAYNE *v.* UNITED STATES. Application for bail pending appeal to the United States Court of Appeals for the Seventh Circuit, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. A–1169. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–27. PRINCE GEORGE'S COUNTY, MARYLAND *v.* STATE WATER CONTROL BOARD ET AL. Application for stay of an order of the United States District Court for the District of Columbia, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–77. ALADDIN HOTEL CORP. ET AL. *v.* NEVADA GAMING COMMISSION ET AL. C. A. 9th Cir. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–33. O'HAIR ET AL. *v.* HILL ET AL. C. A. 5th Cir. Application for preliminary injunction, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–1162 (79–1815). SALOB *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–52 (80–5263). BULLWINKLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

Rehearing Denied

No. 79–8. UNITED STATES *v.* RADDATZ, 447 U. S. 667;

No. 79–343. SUN SHIP, INC. *v.* PENNSYLVANIA ET AL., 447 U. S. 715;

No. 79–394. UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS, *ante*, p. 242;

No. 79–6334. ATTWELL *v.* UNDERCOFLER, CHIEF JUSTICE, SUPREME COURT OF GEORGIA, ET AL., 446 U. S. 955;

No. 79–6362. DOBBERT *v.* FLORIDA, 447 U. S. 912; and

No. 79–6592. WILKERSON *v.* WILKERSON ET AL., 447 U. S. 935. Petitions for rehearing denied.

SEPTEMBER 3, 1980

Dismissal Under Rule 53

No. 80–4. MITSUBISHI INTERNATIONAL CORP., INC. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (BRS, INC., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

SEPTEMBER 4, 1980

Dismissal Under Rule 53

No. 79–6781. PADGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 619 F. 2d 783.

SEPTEMBER 10, 1980

Dismissal Under Rule 53

No. 78–918. REPUBLIC STEEL CORP. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL.; and

No. 78–919. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 909.] Writs of certiorari dismissed under this Court's Rule 53.

SEPTEMBER 12, 1980

Dismissal Under Rule 53

No. 79–1203. LUCKY MC URANIUM CORP *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. [Certiorari granted, 447 U. S. 920.] Writ of certiorari dismissed under this Court's Rule 53.

SEPTEMBER 17, 1980

Rehearing Denied

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL., *ante*, p. 358;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL., *ante*, p. 358;

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL., *ante*, p. 358; and

No. 79–1268. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MCRAE ET AL., *ante*, p. 297. Motions of Richard Abel et al. and Abortion Rights Council of Minnesota et al. for leave to file briefs as *amici curiae* granted. Petitions for rehearing denied.

No. 79–561. NEW YORK NEWS, INC. *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL., *ante*, p. 910;

No. 79–669. DAWSON CHEMICAL CO. ET AL. v. ROHM & HAAS CO., *ante*, p. 176; and

No. 79–1615. HALL *v.* CALIFORNIA ET AL., 447 U. S. 917. Petitions for rehearing denied.

No. 79–1634. STARR ET AL. *v.* NIXON, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 446 U. S. 953;

No. 79–1714. ALEXANDER *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL., 447 U. S. 924;

No. 79–6099. STARVAGGI *v.* TEXAS, *ante*, p. 907; and

No. 79–6350. BARFIELD *v.* NORTH CAROLINA, *ante*, p. 907. Petitions for rehearing denied.

SEPTEMBER 18, 1980

Certiorari Denied

No. 80–182. CELEBREZZE, SECRETARY OF STATE OF OHIO *v.* ANDERSON ET AL. C. A. 6th Cir. Renewed motion of petitioner to expedite consideration of the petition for writ of certiorari granted. Certiorari before judgment denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would grant the petition and set the case for oral argument during the week of October 6, 1980.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 918 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL.

ON APPLICATION FOR STAY

No. A–1135. Decided June 28, 1980

An application to stay the District Court's preliminary injunction against implementation of the labor protection arrangement provisions of the Rock Island Railroad Transition and Employee Assistance Act in connection with the liquidation in bankruptcy of the Chicago, Rock Island and Pacific Railroad, is denied. It appearing that a stay would set in motion a chain of events that would lead to substantial payments to employees of the railroad that would be unconstitutional and unrecoverable, a sufficient showing of irreparable damage to the estate has been made to support the preliminary injunction.

MR. JUSTICE STEVENS, Circuit Justice.

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad (the Rock Island) pursuant to § 77 of the Bankruptcy Act, 11 U. S. C. § 205, have been pending before Judge McGarr in the United States District Court for the Northern District of Illinois for over five years. Because the Rock Island had been sustaining continuing substantial losses, on January 25, 1980, Judge McGarr ordered the Trustee to prepare and file a preliminary plan of liquidation. On May 27, 1980, the Interstate Commerce Commission filed an advisory report with the District Court concluding "that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Consistent with its own precedents, the Commission apparently did not recommend that any special labor protection condition be imposed on the Rock Island in

connection with the abandonment. On June 2, 1980, after receiving briefs and hearing argument, Judge McGarr entered an order authorizing complete abandonment of all Rock Island operations and expressly holding that "no labor protection arrangements may be imposed on the Rock Island estate."

Two days earlier, however, the President had signed Public Law 96–254, 94 Stat. 399, 45 U. S. C. § 1001 *et seq.* (1976 ed., Supp. IV), entitled the Rock Island Railroad Transition and Employee Assistance Act (Act). Section 106 (a) of the Act required the Trustee, within 10 days, to enter into an agreement with the collective-bargaining representatives of Rock Island employees and former employees to provide for labor protection payments to terminated employees. Section 106 (b) authorized the Interstate Commerce Commission to impose a labor protection arrangement on the estate if the Trustee failed to reach agreement with the unions. Section 110 of the Act authorized the Trustee to borrow up to $75 million from the United States to provide the funds for payments pursuant to that arrangement. It further provides that such borrowing, as well as the employee protection claims themselves, should be treated as an expense of administration. It is my understanding that, effectively, the employee protection payments and any concomitant obligations of repayment to the United States are thus given priority over the claims of the general creditors on the assets of the estate. The Act further provides that no court may stay the payment of any labor protection benefits. And finally, § 110 (e) provides: "Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under § 106 of this Title." [1]

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[1] An explanation of the Act is found in the Senate proceedings. See remarks of Senator Kassebaum of Kansas, 126 Cong. Rec. 4869–4870

Within the 10-day period, the Trustee applied for a preliminary injunction against implementation of the labor protection arrangement provisions of the Act on the ground that

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(1980). In substance, it appears that the Senator was particularly concerned with preserving the possibility of selling a portion of the Rock Island, known as the Tucumcari Line from Kansas City to New Mexico, to the Southern Pacific Railroad. She explained that the bill extended "directed service" of the Rock Island, which as I understand it, means service ordered by the Federal Government with any losses incurred underwritten by the Federal Government. She indicated that in February representatives of the labor unions and the acquiring railroads had worked out labor agreements adequate to protect employees who would be re-employed by the acquiring roads, but that there was a substantial risk that no protection would be made available to terminated employees who would not be re-employed, and that the smooth transfer might be interrupted by a broad strike called to obtain compensation for the employees who lost their jobs. It was in order to avoid this prospect that the bill was apparently designed to compel the estate to make adequate termination payments that it was not already obligated to make to those terminated employees. It also appears that the original plan was to fund $50 million for those employees, $30 million of which would be secured by the Government as a high priority administration expense, the other $20 million being subordinated to the claims of all other creditors. The total loan was changed to $75 million prior to passage, and, more significantly, all of the loan was to be given the high priority of an administration expense. Thus, Congress rather clearly indicated its intent that the Government ultimately not be required to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

See also the remarks of Congressman Madigan, 126 Cong. Rec. 7096 (1980), in support of H. R. 6837, which included two titles, the first containing provisions for the completion of the northeast corridor. Title II, which became the Rock Island Railroad Transition and Employee Assistance Act, seemed primarily intended to authorize so-called "directed service" to be funded by the Federal Government, but it also included the employee protection program. With respect to the latter, Congressman Madigan stated, in part:

"There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and

the statute authorized an unconstitutional taking of the property of the estate. Judge McGarr granted that relief, concluding that (1) the procedural provisions of the Act required him to take action immediately in order to preserve the estate from irreparable damage, (2) there were no pre-existing contractual or statutory obligations to make labor protection payments that were being quantified by the Act, and (3) the Act would serve neither a public purpose nor the interest of the estate in view of the total abandonment of the Rock Island's operations that had been authorized. He also implicitly concluded that the statutory program could not be justified as necessary to facilitate sales by the Trustee of portions of the railroad's operating properties.

On June 21, 1980, applicant Railway Labor Executives' Association applied to me in my capacity as Circuit Justice for a stay of Judge McGarr's preliminary injunction.[2] Four days later, on June 25, 1980, the United States filed a memorandum supporting that stay application. The applicant contends that the estate will not suffer irreparable damage by simply permitting the negotiation of a labor protection plan to commence. It argues that even if payments pursuant to such a plan would result in an unconstitutional taking of the estate's property, the estate might still be able to convince Judge McGarr that the statutory prohibition against court orders prohibiting payments pursuant to such arrangement is

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it is structured exactly the same as the Milwaukee bill which we passed late last year.

. . . . .

"At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. *The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad.*" *Ibid.* (Emphasis added.)

It is worth noting that the "Milwaukee bill" concerned a genuine railroad reorganization, not a liquidation.

[2] Appeal lies to this Court under 28 U. S. C. § 1252, since Judge McGarr held an Act of Congress unconstitutional.

unconstitutional, and that it would be better to enjoin such payments rather than the negotiation of the underlying plan. Alternatively, it is argued that a remedy against the Government to make the estate whole may ultimately be available in the Court of Claims under the Tucker Act if it turns out that any payments made were unconstitutionally required.

Like Judge McGarr, I do not find persuasive any of the suggestions that the Act could not cause the estate irreparable harm. And while the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, see Memorandum for United States 5–6, it is obvious that his suggestion is equivocal. Moreover, having read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the Trustee argues.

Accordingly, since there is a strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that would be unconstitutional and unrecoverable, I believe that a sufficient showing of irreparable damage has been made to support the entry of the preliminary injunction. Necessarily, my views are tentative, based as they are on the relatively brief submissions of the parties. Nonetheless, for the foregoing reasons, I have decided to deny the application for a stay.

ROSTKER, DIRECTOR OF SELECTIVE SERVICE, ET AL. *v.* GOLDBERG ET AL.

ON APPLICATION FOR STAY

No. A–70. Decided July 19, 1980

An application to stay, pending review on appeal, the three-judge District Court's order invalidating the registration provisions of the Military Selective Service Act on the ground that exclusion of females from such provisions constitutes gender-based discrimination in violation of the equal protection component of the Fifth Amendment, is granted. It appears that there is a "reasonable probability" that four Justices will note probable jurisdiction, that there are "fair" prospects for a reversal, and that, in balancing the irreparable harm that allegedly would result to the Government if the stay is denied against the harm that allegedly would result to the persons required to register under the Act if the stay is granted, the equities favor the Government.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending review on appeal of the July 18, 1980, order of a three-judge District Court for the Eastern District of Pennsylvania invalidating the registration provisions of the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, and enjoining the Government from enforcing them.[1] At stake are the Government's plans

[1] Briefly, the procedural history of this case is as follows: The original complaint was filed in June 1971 by male citizens subject to registration and induction who argued that the Selective Service Act violated several of their constitutional rights, including the right to equal protection of the laws guaranteed by the Fifth Amendment. Application to the United States District Court for the Eastern District of Pennsylvania for the convening of a three-judge court under the then applicable statute, 28 U. S. C. § 2282 (1970 ed.), was denied, and the suit was dismissed. On review, the United States Court of Appeals for the Third Circuit upheld the dismissal of all claims except that founded upon the failure to conscript females. The Court of Appeals remanded the case to the District Court for a determination of the substantiality of the equal protection claim, and of plaintiffs' standing to raise that issue. On remand, the Dis-

to register more than four million males born in 1960 and 1961 in the two weeks commencing on July 21.

The District Court concluded that the exclusion of females from the registration provisions constitutes gender-based discrimination and that the federal parties had failed to demonstrate that the exclusion was substantially related to an important governmental interest. Accordingly, it found the provisions violative of the equal protection component of the Fifth Amendment. The applicants, Bernard Rostker, Director of Selective Service *et al.*, urge both that the District Court applied too strict a standard of scrutiny in light of the national defense interests at stake, and that even under the standard which that court applied the decision not to include females could be justified. Beyond that, the applicants contend that the Government will suffer irreparable injury if it is not permitted to go forward with implementation of the President's July 21 through August 2 call for draft registration, while respondents—a class including persons required to register within the next two weeks—will suffer only minor and remediable harms should I decide to stay the District Court's injunction. Respondents submit that the three-judge court properly decided the constitutional question before it, that

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trict Court found that plaintiffs had standing, and convened a three-judge court.

On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, denied defendants' motion to dismiss. *Rowland* v. *Tarr*, 378 F. Supp. 766. There were no further proceedings until June 1979, when the court proposed to dismiss the case due to inaction. Additional discovery ensued, and on February 17, 1980, defendants' motion for summary judgment was denied. On July 1, 1980, a plaintiff class of potential registrants was certified, and on July 18, 1980, the District Court entered its order enjoining registration under the Selective Service Act and declined to enter a stay of execution.

Although the statute authorizing three-judge courts in actions such as this was repealed in 1976, Pub. L. 94-381, §§ 1 and 2, 90 Stat. 1119 (Aug. 12, 1976), the Act remains applicable to suits filed before the date of repeal, § 7, 90 Stat. 1120.

its injunction was proper, and that its subsequent decision to deny a stay of that injunction was likewise appropriate.

The principles that control a Circuit Justice's consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. *Whalen* v. *Roe*, 423 U. S. 1313, 1316–1317 (1975) (MARSHALL, J., in chambers). In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction, *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers); *Mahan* v. *Howell*, 404 U. S. 1201, 1202 (1971) (Black, J., in chambers). Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, *supra*, at 1203–1204. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. *Whalen* v. *Roe*, *supra*, at 1316; *Graves* v. *Barnes*, *supra*, at 1203. And fourth, in a close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large. Cf. *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers) (citing cases); *Republican Committee* v. *Ripon Society*, 409 U. S. 1222, 1224 (1972) (REHNQUIST, J., in chambers).

That the first prong of this test is satisfied is undeniable.

The importance of the question and the substantiality of the constitutional issues are beyond cavil. The second prong is more troubling. In my judgment the case is a difficult and perplexing one. My task, however, is not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole. In the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate, compare *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), with *Craig* v. *Boren*, 429 U. S. 190 (1976). And my Brethren's application of the standard upon which we have finally settled in a context as sensitive as that before me cannot be predicted with anything approaching certainty. Nonetheless, it does seem to me that the prospects of reversal can be characterized as "fair." I therefore turn to the interrelated inquiries that make up the third and fourth prongs of the approach set forth above.

The applicants identify three distinct injuries that the United States would sustain if the District Court's order were to remain in force and this Court were then to uphold the Selective Service Act. First, during the life of the District Court's injunction, the United States is barred from instituting registration without time-consuming congressional action, even in the face of a clear and present threat to national security. Accordingly, the Nation's military capability to respond to emergencies would remain uncertain until the full Court completes review of the ruling below.[2] See Affidavit of W. Graham Claytor, Deputy Secretary of Defense, at 2 (July 16, 1980); Affidavit of Bernard Rostker, Director of Selective Service, at 2 (July 15, 1980). Second, the inauguration of registration by the President and the Congress was

[2] Further, inasmuch as congressional appropriations for registration lapse on September 30, 1980, at the end of the current fiscal year, Affidavit of John P. White, Deputy Director of Office of Management and Budget, at 6 (July 15, 1980), a decision by the full Court in favor of the Government after that date will necessitate additional delay while Congress authorizes a new appropriation.

not merely a predicate to possible future conscription. It was an act of independent foreign policy significance—a deliberate response to developments overseas. Thus, a suspension of registration until a decision on its validity is reached might frustrate coordinate branches in shaping foreign policy. Affidavit of John P. White, Deputy Director of Office of Management and Budget, at 2–4 (July 15, 1980); Affidavit of W. Graham Claytor, *supra*, at 3; Affidavit of Warren Christopher, Deputy Secretary of State, at 1–2 (July 12, 1980).[3] Third, considerable resources have been expended in preparation for the imminent registration effort. The Government has distributed publicity material, trained and assigned personnel, engaged computer support, and entered into contractual arrangements, all with a view toward the commencement of actual registration on Monday, July 21. Should the Government ultimately prevail at some future date, these preparations will have to be replicated at considerable expense. Affidavit of Bernard Rostker, *supra*, at 4–5; Affidavit of John P. White, *supra*, at 6. While difficult to evaluate with precision, these are considerations of palpable weight.

For their part, respondents urge that should they eventually succeed on the merits they will have suffered irreparable injury by virtue of having had to register during the pendency of the Government's appeal. But although registration imposes material interim obligations upon respondents—including the duty to appear—I cannot say that the inconvenience of those impositions outweighs the gravity of the harm to the United States should the stay requested be refused. Nor does an irremediable injury stem from the fact that respond-

[3] To be sure, the extent and duration of these irreparable injuries could be curtailed if the Government were substantially to amend the Selective Service Act during the period preceding review by this Court. In light of the serious question raised by this case, however, the Government should not be obliged to abandon an important statutory scheme without an opportunity for plenary consideration by the Court.

ents' names will be enrolled upon registration lists. If respondents' claim is upheld, the destruction of those lists can be ordered. On balance, therefore, I conclude that the equities favor the Government. Accordingly, I have today entered an order staying execution and enforcement of the District Court's judgment.

IN RE ROCHE

ON APPLICATION FOR STAY

No. A-66. Decided July 23, 1980

An application to stay, pending a petition for certiorari, a Massachusetts Supreme Judicial Court Justice's order adjudicating applicant television news reporter in civil contempt for refusal to disclose the identities of news sources in connection with disciplinary proceedings against a state judge, and the Supreme Judicial Court's affirmance of such order, is granted. It appears reasonably probable that four Justices will vote to grant certiorari, that there is a fair prospect of reversal, and that, in considering the irreparable harm that would result to applicant if the stay is denied, the balance of equities favors a stay.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay of enforcement, pending a petition for a writ of certiorari, of the July 10, 1980, order of a single justice of the Massachusetts Supreme Judicial Court, adjudicating applicant in civil contempt for refusal to disclose the identities of news sources, and of the July 16, 1980, order of the Supreme Judicial Court affirming the adjudication of contempt.

Applicant Roche is a reporter who participated in a television news team's investigation of a number of state judges. On January 11, 1979, applicant broadcasted a television news story about alleged misconduct by respondent, a State District Court Justice. The report prompted an investigation by the Massachusetts Commission on Judicial Conduct that culminated in the filing of formal proceedings.

In anticipation of disciplinary hearings, the Commission furnished the state judge with the names of 65 witnesses whom the Commission proposed to call. Among these was applicant. On May 16, the Commission issued an order allowing the judge to depose 11 of the 65 witnesses, including applicant. At his deposition, applicant testified about his own observa-

tions in the course of his investigation, and indicated a willingness to reveal the content of interviews with any individual who could be independently identified as one of applicant's sources. Accordingly, applicant did communicate to respondent judge the substance of his interviews with those persons who publicly appeared on the television news broadcast. Applicant also conceded that names of all the people whom he had previously interviewed were contained in the list of witnesses for the disciplinary hearings. Citing a newsman's "privilege," however, applicant refused to specify or discuss those on the list whom he had interviewed in confidence, unless they had first been identified by other means.

In the course of some procedural skirmishing, applicant Roche moved for a protective order from Justice Kaplan of the Supreme Judicial Court based upon this asserted newsman's privilege, and respondent judge sought an order compelling applicant to identify his sources. Justice Kaplan referred the issue to the Conduct Commission, which ruled that the claim of newsman's privilege under the First Amendment was insubstantial, and that applicant should divulge the identities of his sources so that the respondent judge could prepare to impeach or correct the testimony of those sources during the hearings. Upon renewal of the motions to him, Justice Kaplan concurred in the Commission's view. He reasoned that inasmuch as the applicant had consented to disclose the substance of interviews with sources if otherwise identified—as through the process of deposing each of the 65 hearing witnesses—the net effect of applicant's claim of privilege was simply to compel the respondent judge to sift through a series of deponents to obtain information directly available from the reporter. Justice Kaplan concluded that "no significant principle [was] to be served by the suggested approach," Applicant's Ex. B., p. 4, and, on July 7, ordered Roche to respond to questions about unidentified sources.

Applicant subsequently appeared at a deposition but once again declined to identify his undisclosed sources. On July

10, Justice Kaplan adjudicated him in civil contempt, and stayed execution of the contempt order. The adjudication of contempt was affirmed by the full Supreme Judicial Court on July 16, and the next day Justice Kaplan ordered that the stay of civil contempt sanctions be vacated on July 21. Upon application to me as Circuit Justice, I entered an interim order continuing the stay pending filing of a response and further order of the Circuit Justice or this Court.

Only recently, I have had occasion to review the principles that guide a Circuit Justice's determination of stay applications. *Rostker* v. *Goldberg, ante,* p. 1306. Generally, a stay will issue upon a four-part showing that (1) there is a "reasonable probability" that four Justices will find the issue sufficiently substantial to grant certiorari; (2) there is a "fair prospect that a majority of the Court will conclude that the decision below was erroneous," *ante,* at 1308; *Times-Picayune Publishing Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers);[1] (3) irreparable harm to applicant is likely to result if the request for a stay is denied; and (4) the "balance of equities"—to the parties and to the public—favors the issuance of a stay.

Predicting the probability of a grant of certiorari and of a reversal of the decision below in this case is an uncertain undertaking. The question of a newsman's privilege to conceal sources is not a matter of first impression. *Branzburg* v. *Hayes,* 408 U. S. 665 (1972), held that the First Amendment does not provide newsmen with an absolute or qualified testimonial privilege to be free of relevant questioning about

[1] In *Rostker,* my evaluation of the "fair prospect" for reversal of the decision below was conducted in the context of a direct appeal. Where review is sought by the more discretionary avenue of writ of certiorari, however, the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case. Thus, it may be that the "fair prospect"-of-reversal criterion has less independent significance in a stay determination when review will be sought by way of certiorari.

sources by a grand jury. More recently, two of my Brethren found the prospects for review by the full Court insufficient to warrant staying contempt proceedings against a New York Times reporter for his failure to submit documents to *in camera* judicial inspection in compliance with a subpoena for those documents by the defendant in a murder trial. *New York Times Co.* v. *Jascalevich*, 439 U. S. 1317 (1978) (WHITE, J., in chambers); *New York Times Co.* v. *Jascalevich*, 439 U. S. 1331 (1978) (MARSHALL, J., in chambers).

At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoenaing of confidential information and work product from a newsgatherer. Four dissenting Justices in *Branzburg* discerned at least some protection in the First Amendment for confidences garnered during the course of newsgathering. 408 U. S., at 721 (Douglas, J., dissenting); *id.*, at 744–747 (STEWART, J., dissenting, joined by BRENNAN and MARSHALL, JJ.). And MR. JUSTICE POWELL, who joined the Court in *Branzburg*, wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the "vital constitutional and societal interests" at stake. *Id.*, at 710. Consequently, I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds.[2]

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[2] The opinions in chambers denying the requested stay in *New York Times Co.* v. *Jascalevich* on the basis of the unlikelihood of review turned not upon the general meritlessness of a newsman's privilege, but more particularly upon the improbability that such a privilege would be applied to preclude *in camera* inspection of papers by a judge. 439 U. S., at 1322–1323 (WHITE, J.); 439 U. S., at 1337 (MARSHALL, J.); see *United States* v. *Nixon*, 418 U. S. 683 (1974).

Respondent also suggests that *Herbert* v. *Lando*, 441 U. S. 153, 167–169 (1979), contradicts any assertion of a newsman's privilege. That decision, however, dealt with discovery of editorial processes when the collective state of mind of a news organization was directly in issue in a suit against that organization.

Assuming that there is at least a limited First Amendment right to resist intrusion into newsgatherers' confidences, this case presents an apt occasion for its invocation. As determined by Justice Kaplan below, respondent judge could have obtained the information sought from the applicant by other adequate—albeit somewhat roundabout—methods. Thus, this case does not present a question of necessity for the confidences subpoenaed. What is ranged against the asserted First Amendment interests of the applicant is essentially respondent's convenience. If I am correct, therefore, that a majority of the Court recognizes at least some degree of constitutional protection for newsgatherers' confidences, it is reasonably probable that four of my Brothers will vote to grant certiorari, and there is a fair prospect that the Court will reverse the decision below.[3]

Turning to consider the irreparable harm of the applicant in the absence of a stay, and to weigh the "balance of equities," I conclude that these favor the continuation of the stay below pending a petition for writ of certiorari and disposition thereof. Without such a stay, applicant must either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail. If the stay remains in force, on the other hand, the judge subject to the disciplinary inquiry can obtain the information he seeks by deposing the hearing witnesses. The hardship that this would impose—although not negligible—does not outweigh the unpalatable choice that civil contempt would impose upon the applicant. Finally, even respondent's burden of going forward without the desired cooperation of the applicant can be alleviated by an agreement with the Commission to continue disciplinary

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[3] Civil contempt proceedings such as these—against a nonparty and colored by First Amendment overtones—are appealable for purposes of our review. *New York Times Co.* v. *Jascalevich, supra,* at 1318–1319 (WHITE, J., in chambers). The judgment sought to be stayed has been affirmed by the Supreme Judicial Court of Massachusetts and is final.

proceedings until resolution of applicant's petition for a writ of certiorari.[4]

Having decided that a stay pending a timely petition for writ of certiorari and disposition thereof is warranted,[5] I have today entered an order continuing my stay of enforcement of the order of the single justice of July 10, 1980, adjudicating applicant Roche in civil contempt.

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[4] Respondent judge suggests that "the ends of justice might . . . be served by the Circuit Justice ordering a stay of the formal proceedings against the Respondent." Memorandum in Opposition 7. Should the Commission and respondent judge be unable to agree upon a continuance, respondent judge is, of course, free to apply for a stay of the proceedings in accordance with proper procedures.

[5] For the reasons stated in this opinion, I believe that applicant's showing is sufficient to support my order of a stay notwithstanding the denial of an indefinite stay below. Cf. *Rostker* v. *Goldberg*, *ante*, p. 1306.

McDANIEL ET AL. *v.* SANCHEZ ET AL.

ON APPLICATION FOR STAY

No. A-126. Decided August 14, 1980

An application to stay, pending the disposition of a petition for certiorari, the Court of Appeals' judgment requiring applicant Texas county officials to proceed with procedures for the "preclearance," under Section 5 of the Voting Rights Act of 1965, of a new apportionment plan for county commissioner precincts ordered by the District Court and approved by the county commissioners, is granted. It appears that there is a "reasonable probability" that four Members of this Court will vote to grant certiorari and that the balance as to the possibility of "irreparable harm" favors the applicants.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit, pending consideration of a petition for certiorari. Applicants are officials of Kleberg County, Tex., who have been ordered by the United States District Court for the Southern District of Texas to proceed immediately with procedures for the "preclearance" of a new apportionment plan for county commissioner precincts under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c.

I

This suit began in 1978 as a class action challenging the boundary lines of the four county commissioner precincts in Kleberg County. Plaintiffs claimed that these precincts, as drawn, violated the one-person, one-vote principle and unconstitutionally diluted the voting strength of Mexican-Americans. After a trial, the District Court found that the precincts did violate the one-person, one-vote principle, but ruled that plaintiffs had failed to meet their burden of proof on the dilution claim.

The District Court then directed defendants to submit a proposed new apportionment plan. That plan was drawn by a university professor selected by the County Commissioners and approved for submission to the District Court by the Commissioners. The District Court approved the plan and rejected an argument by plaintiffs that preclearance under the Voting Rights Act was necessary, relying on *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) (*per curiam*). In *East Carroll* this Court stated that "court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5." *Id.*, at 638, n. 6.

On appeal, the Fifth Circuit reversed in a *per curiam* opinion. 615 F. 2d 1023 (1980). It relied on this Court's later decision in *Wise* v. *Lipscomb*, 437 U. S. 535 (1978), for the proposition that plans drawn up or approved by a legislative body are "legislative" plans even if submitted in response to a court order. As a result, the Court of Appeals found that the plan in this case is legislative and concluded that it is subject to the preclearance provisions of § 5. The court remanded the case for appropriate action and the District Court then ordered applicants to begin the § 5 procedures "immediately." On July 25, 1980, the Fifth Circuit denied a stay pending consideration of a petition for a writ of certiorari.

II

The preclearance procedures at issue here require either an action in the District Court for the District of Columbia for a declaratory judgment that the new plan is not racially discriminatory, or submission of the plan to the Attorney General of the United States, who may interpose an objection within 60 days. 42 U. S. C. § 1973c. See *Allen* v. *State Board of Elections*, 393 U. S. 544, 548–550 (1969). Applicants will argue in their petition for certiorari that they should not be required to follow these procedures because this apportionment plan was court-ordered and was not the prod-

uct of a legislative action. They argue in this application that their petition is likely to be granted because the decisions of this Court have left unsettled the principles that determine which apportionment plans are essentially "legislative," as opposed to "judicial," in nature. They further argue that a stay is necessary in order to prevent their claim from becoming moot before it can be heard.

In *Wise* v. *Lipscomb, supra,* we faced the question whether a plan for the election of members of the City Council of Dallas was judicial or legislative. The existing system of electing members at large had been declared unconstitutional, and the city had been given an opportunity by the court to produce a substitute plan. Because the plan submitted by the City Council, and approved by the District Court, included a provision for the election of several council members at large, it was necessary to decide whether the plan was invalid under *East Carroll, supra,* in which we held that *judicially* imposed plans should not, absent special circumstances, include multimember districts.

The Court in *Wise* decided that the Dallas plan was legislative, rather than judicial, and therefore was exempt from the higher level of scrutiny accorded to judicial plans. MR. JUSTICE WHITE, in an opinion joined by MR. JUSTICE STEWART, viewed the plan as one enacted by the City Council, emphasizing that in his view the Council was exercising its lawful powers in so acting. 437 U. S., at 546–547. MR. JUSTICE MARSHALL, in a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS, agreed that the power of the legislative body under state law to enact the plan at issue is an important factor, but disagreed about the powers possessed by the City Council in that case. He concluded that the Council could only have acted pursuant to a court order and that the case was therefore controlled by *East Carroll, supra,* at 638, n. 6, where we labeled a plan "judicial" partly because

the legislative body had no authority to reapportion itself. 437 U. S., at 550–554. My opinion concurring in part and concurring in the judgment, joined by the three remaining Justices, asserted that assumptions about state law were "unnecessary" because the "essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Id.*, at 548.

Arguably, it was this last approach that the Court of Appeals followed in the present case. It determined that the plan was a legislative one because it was approved for submission by the Commissioners of Kleberg County. The Court of Appeals was apparently unconcerned that the reapportionment might be outside the Commissioners' legislative powers.[1] If so, it can be contended that the court was following an approach that has been endorsed by only a minority of Justices. Applicants also make a substantial argument that this approach is inconsistent with the decision in *East Carroll*, as that case has been interpreted by the majority of this Court.[2]

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[1] Under Tex. Rev. Civ. Stat. Ann., Art. 2.04 (1) (Vernon Supp. 1979), the Commissioners can only enact a reapportionment plan during their July or August terms. See *Wilson* v. *Weller*, 214 S. W. 2d 473 (Tex. Civ. App. 1948). The plan in this case was submitted in November. Respondents contend, however, that the Commissioners have an "inherent" power to reapportion their precincts when a "vacuum" has been created by a court ruling that the existing precincts are drawn unconstitutionally.

[2] Indeed, this apparent inconsistency may have produced a conflict within the Fifth Circuit on the issues raised here. In *Marshall* v. *Edwards*, 582 F. 2d 927 (1978) (en banc), cert. denied, 442 U. S. 909 (1979), a case involving the same litigation as *East Carroll* but an entirely different plan, the Fifth Circuit labeled that plan "court-ordered" partly because the legislative body merely submitted it, rather than adopting it. 582 F. 2d, at 933–934. Applicants contend that the Commissioners acted in a similarly limited fashion here.

III

It is fair to say that the opinions in *East Carroll* and *Wise* v. *Lipscomb* fall considerably short of providing clear guidance to the courts that initially address this difficult issue. It would be helpful, therefore, for this Court to exercise its responsibility to provide such guidance. It seems to me that this case presents the opportunity.

I mention briefly the settled principles that govern the granting of stays. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers). In view of the ambiguity of our precedents (to which I may have contributed), I cannot say whether the possibility of reversal is significant. I do think there is a "reasonable probability" that four Members of the Court will consider the issue sufficiently meritorious—and the need for clarification sufficiently evident—to warrant a grant of certiorari. The applicants assert that, absent a stay, they will be required immediately to expend substantial money on preclearance procedures, and that this expenditure will be irretrievable. They argue further that without a stay their petition to this Court will become moot. The balance as to the possibility of "irreparable harm" seems to favor the applicants.

I will therefore enter an order recalling the mandate and staying the judgment of the United States Court of Appeals for the Fifth Circuit pending disposition of the petition for certiorari.

WILLHAUCK *v.* FLANAGAN ET AL.

ON APPLICATION FOR STAY

No. A–169. Decided August 28, 1980

An application for a stay pending appeal to the Court of Appeals from the District Court's order denying applicant's request for a temporary restraining order enjoining, on double jeopardy grounds, two separate Massachusetts state-court prosecutions against him, is denied. Applicant has not alleged sufficient irreparable harm to warrant considering whether there is a reasonable probability that four Justices of this Court would consider the issue whether an exception to the doctrine of *Younger* v. *Harris*, 401 U. S. 37, should be made for double jeopardy claims to be sufficiently meritorious to grant certiorari should the merits of the case eventually come before this Court.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending appeal to the United States Court of Appeals for the First Circuit from an order of the United States District Court for the District of Massachusetts denying a request for a temporary restraining order. The facts are briefly as follows. On July 2, 1979, the applicant, Francis A. Willhauck, Jr., allegedly led local police on a high-speed automobile chase through Norfolk and Suffolk Counties. He was finally arrested in Suffolk County and charged with various offenses by the District Attorneys in both counties. In Norfolk County (Quincy District Court), he was charged with driving so as to endanger, failure to stop for a police officer, failure to slow down for an intersection, and driving at an unreasonable speed. In Suffolk County (West Roxbury District Court), he was also charged with driving so as to endanger and failure to stop for a police officer, and in addition was charged with assault and battery with a motor vehicle.

With the complaints pending in the respective county District Courts, applicant moved in Quincy District Court to

consolidate the cases into a single proceeding there pursuant to Rule 37 of the Massachusetts Rules of Criminal Procedure. However, since the Rule requires the written approval of both prosecuting attorneys to effectuate transfer and consolidation, his attempt failed when one of the District Attorneys apparently declined to approve the consolidation. Applicant subsequently moved for consolidation in at least one of the Superior Courts of Norfolk and Suffolk Counties, where his indictment was handed down, but the motion was similarly denied.

Finally, applicant brought his claim before a single justice of the Massachusetts Supreme Judicial Court, contending, *inter alia*, that failure to consolidate would put him twice in jeopardy for the same offenses, in violation of the Constitution. The justice dismissed it in a four-page memorandum and order for judgment entered June 19, 1980, rejecting applicant's argument that the charges in the two counties were for a single offense. He also noted that, even if he had the power to transfer and consolidate the two trials, he would refuse to do so because, in his view, this would be an unwarranted intrusion and interference with the lower courts and prosecutors.

On August 1, 1980, Willhauck brought an action pursuant to 42 U. S. C. § 1983 in Federal District Court to obtain a declaration that Massachusetts Rule of Criminal Procedure 37 (b)(2), giving prosecuting attorneys a veto over transfer and consolidation, violates the Double Jeopardy and Due Process Clauses of the Constitution. He sought a temporary restraining order, a preliminary injunction, and a permanent injunction against the two county District Attorneys to enjoin their criminal prosecutions against him. The District Court entered an order denying a temporary restraining order on August 12, 1980, on the basis that applicant's prayer for relief did not fall within one of the recognized exceptions to the rule announced in *Younger* v. *Harris*, 401 U. S. 37 (1971). Will-

hauck later moved for a stay of the District Court order in the Court of Appeals for the First Circuit pending appeal. The Court of Appeals denied this motion on August 13, 1980, assuming without deciding that the District Court's order was "in reality" an order denying a preliminary injunction.

Willhauck now applies to me as Circuit Justice for a stay pending resolution of his appeal to the Court of Appeals for the First Circuit. The cases against him appear to be proceeding simultaneously in Suffolk Superior and Quincy District Courts. He was scheduled for "status" hearings in the two courts on August 14, or August 14 and 15, 1980. Applicant advises me that both cases now have been continued until September 12, 1980.

In my view, Willhauck has a potentially substantial double jeopardy claim, if not on the face of the Massachusetts Rule or as applied to him, then simply on the possibility the State may conduct simultaneous prosecutions against him in two separate courts on the same offenses. Whether the *Younger* doctrine would bar federal intervention in a continuing state criminal proceeding in this simultaneous prosecution context or, for that matter, in a case where the claim of double jeopardy is made after jeopardy has attached in the first proceeding, seems to me an open question. The principles of *Abney* v. *United States*, 431 U. S. 651 (1977), and *Harris* v. *Washington*, 404 U. S. 55 (1971) (*per curiam*), suggest that an exception to *Younger* for double jeopardy claims may be appropriate, at least when all state remedies have been exhausted.

Nevertheless, I do not find that applicant has alleged sufficient irreparable harm for me to consider whether there is a reasonable probability that four Justices would consider the above issue sufficiently meritorious to grant certiorari, should the merits of the case eventually come before us. Neither trial has begun and no jury has been empaneled. Until a jury is empaneled and sworn, *Crist* v. *Bretz*, 437 U. S. 28, 38

(1978), or, in a bench trial, until the first witness is sworn, *id.*, at 37, n. 15 (federal rule); *Serfass* v. *United States*, 420 U. S. 377, 388 (1975) (federal rule), jeopardy does not attach. Accordingly, applicant's constitutional claim is premature. Of course, once jeopardy does attach in one of the trials, applicant should be able to make his claim before the second trial judge, at which time the courts can give due consideration to his claim.

Therefore, I deny the application for a stay pending appeal.

CERTAIN NAMED AND UNNAMED NON-CITIZEN CHILDREN AND THEIR PARENTS *v.* TEXAS

ON APPLICATION TO VACATE STAY

No. A–179. Decided September 4, 1980

An application to vacate the Court of Appeals' stay, pending appeal, of the District Court's injunction prohibiting Texas education officials from denying free education to any child, otherwise eligible, due to the child's immigration status—the District Court having held that a Texas statute which prohibits use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment—is granted. This order is without prejudice to a school district's ability to apply for a stay of the District Court's injunction, which stay would be justified if the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the injunction's operation would severely hamper the provision of education to all its students during the coming year. Because of the significance of the District Court's constitutional ruling, it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction, and it is not unreasonable to believe that five Members of the Court may agree with the District Court's decision. Also, the balance of harms weighs heavily on the side of undocumented alien children, who will suffer irreparable harm from denial of public education if the stay is not vacated.

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying, pending appeal, an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code (Supp. 1980), which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth

Amendment.[1] The court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas' motion to stay its injunction, because the court found that a stay "would substantially harm the plaintiffs and would not serve the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their parents.[2] Precise calculation of the number of children in Texas encompassed by this description is impossible. The State estimates that there are 120,000 such children, but the District Court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not been legally admitted to the United States through established channels of immigration. None, however, is presently the subject of deportation proceedings, and many, the District Court found, are not deportable under federal immigration laws. The District Court concluded that "the great majority of the undocumented children . . . are or will become permanent residents of this country."

This case came before the District Court as a result of a consolidation, by the Judicial Panel on Multidistrict Litigation, of lawsuits filed in all federal judicial districts in Texas against the State and state education officials challenging the validity of § 21.031. No other State has a similar statute. The court found that § 21.031 effectively denied an educa-

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[1] Another Federal District Court in Texas had previously held that § 21.031 violates the Equal Protection Clause as applied to the Tyler Independent School District. *Doe* v. *Plyler*, 458 F. Supp. 569 (ED Tex. 1978), appeal pending, No. 78-3311 (CA5).

[2] The United States intervened on the side of plaintiffs below and has filed here a statement in support of the application to vacate the stay.

tion to the plaintiff children. Although they could attend school upon payment of tuition, the court further found that such payment is beyond the means of their families. It held that the Equal Protection Clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on analogous rulings of this Court, see, *e. g.*, *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976) (Due Process Clause of the Fifth Amendment applies to aliens unlawfully residing in the United States), and precedents in lower courts, see *Bolanos* v. *Kiley*, 509 F. 2d 1023, 1025 (CA2 1975) (dictum). In addition, the court found guidance in the language of the Equal Protection Clause, which extends protection to *persons* within a State's jurisdiction, and ruled that a state law which purports to act on any person residing within the State is subject to scrutiny under the Clause.

The District Court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necessary for the exercise of other fundamental rights such as voting and free expression. *Id.*, at 29–39. The court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the question reserved in *Rodriguez* of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the States, an involvement condemned in *Rodriguez*. Applying strict scrutiny, the court held the statute violative of the Equal Protection Clause because it was not justified by a compelling state interest. While not explicitly so holding, the court also implied that it would hold the statute unconstitutional even if it applied

rational-basis scrutiny or merely required that the law be substantially related to an important state interest.

I

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe*, 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers).

When an application to vacate a stay is considered, this formulation must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision.

Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to adjudication of the merits, be exercised with restraint. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim

order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augmented burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful aliens residing in our country has risen dramatically. In more immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Mathews* v. *Diaz* upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress' necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the

relationship between aliens and the States rather than between aliens and the Federal Government." 426 U. S., at 84–85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio Independent School District* v. *Rodriguez, supra,* to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

II

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most

of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for five years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio Independent School District* v. *Rodriguez*, 411 U. S., at 6–17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimis*. But the core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative.

Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year. The admission of numbers of illiterate, solely Spanish-speaking

children may tax the resources of a school district. The affidavits submitted to the Court of Appeals document the possibility of severe stress only in the Houston Independent School District.[3] Affidavits submitted by the applicants indicate, however, that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilities to provide a customary education to all their pupils.

Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely hamper the provision of education to all its students during the coming year, the granting of a stay would be justified.[4]

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[3] The State argues here that serious difficulties can be expected in the Dallas and Brownsville School Districts as well.

[4] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

MOORE ET AL. *v.* BROWN ET AL.

ON APPLICATION FOR STAY

No. A–195. Decided September 5, 1980

An application to stay the District Court's preliminary injunction, which ordered Alabama election officials to conduct district rather than at-large voting to fill vacancies on the Mobile County School Board, is denied. The District Court may have erred in entering such injunction without hearing further evidence or making fresh findings of fact after its prior decision that the at-large voting system violated the Fourteenth Amendment by diluting the effectiveness of black votes had been vacated and the case had been remanded for further proceedings (see *Williams* v. *Brown*, 446 U. S. 236). But in the present posture of the case the unacceptable alternative to allowing the District Court's preliminary injunction to stand would be to enjoin the coming election entirely and to allow incumbents whose terms have expired to remain in office until an at-large election can be held.

MR. JUSTICE POWELL, Circuit Justice.

The applicants, the Mobile County School Board and its Commissioners, request that I stay a preliminary injunction entered by the District Court in another phase of the litigation over the composition of the Board. The injunction ordered Alabama election officials to conduct district rather than at-large voting to fill School Board vacancies.

This Term, in *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court considered a constitutional challenge to Mobile's system of at-large elections for City Commissioners. MR. JUSTICE STEWART wrote for a plurality of four Justices and concluded that the plaintiffs were required to prove a racially discriminatory *purpose* to show that Mobile's at-large voting system violated the Fourteenth Amendment. The District Court, by contrast, had thought it sufficient to show that the existing election system had the *effect* of impeding the election of blacks. The Court of Appeals for the Fifth Cir-

cuit had affirmed.[1] Because we disagreed with the analysis of the District Court and Court of Appeals, we reversed and remanded for further proceedings.

Bolden's companion case, *Williams* v. *Brown*, 446 U. S. 236 (1980) (*Brown I*), involved at-large elections for the School Board. In that case as well, the District Court and Fifth Circuit had held unconstitutional a system of at-large elections, relying on analysis similar to that used by them in *Bolden*. We therefore vacated the judgment and remanded for further proceedings in light of *Bolden*. Approximately 11 weeks later, the Court of Appeals in turn vacated the decision of the District Court and remanded the case to it.

I

The Alabama Legislature created the Mobile County Board of School Commissioners in 1826. Commissioners then were elected at large. That practice has continued to the present day.[2] Under current law, the Board is composed of five persons who serve staggered 6-year terms. The at-large election system contains no obstacle to ballot access by blacks. In *Brown I*, however, the District Court nevertheless concluded that the system of at-large elections "diluted" the effectiveness of black votes. The court ordered a phased-in system of district elections to increase the likelihood that blacks would be elected to the Board. Under the District Court's plan, Mobile County was divided into five districts. Two of the district seats were filled in elections in 1978.[3] Another dis-

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[1] Although recognizing that a discriminatory purpose had to be proved, the Court of Appeals had thought that the "aggregate" of discriminatory effects was sufficient to establish a discriminatory purpose.

[2] In 1975, after this suit was filed, the state legislature passed a local Act restructuring the Board into five single-member districts. A state court subsequently held that the Act violated the Alabama Constitution because of a defect in its publication.

[3] On August 29, 1978, I denied an application to stay the District Court's plan pending review by this Court.

trict seat was scheduled to be filled in an election this fall. The two remaining district seats were to be filled in 1982.

Under the District Court's original plan, however, the introduction of district seats did not necessarily correspond to the expiration of incumbents' terms of office. Only one at-large seat expired in 1978, but two new district seats were added that year.[4] Thus, since 1978 the Board has operated with six members rather than five. The District Court therefore ordered one of the at-large Commissioners whose term is to expire in 1980 to act as the nonvoting "chairman" of the Board during the remainder of his term.[5]

In sum, at the time we vacated the District Court's original plan, the Board contained six members, two of whom had been elected from districts pursuant to the plan. Two at-large seats were due to expire this fall, and one new district member would be elected. Thus, the coming election would have resulted in a return to a five-member Board, three of whom would have been elected from districts.

II

Controversy has followed our decision vacating the District Court's original district election plan. At least some of the at-large Commissioners thought that our decision in effect invalidated the election of the two district Commissioners chosen in 1978. Accordingly, some persons refused to acknowledge the legitimacy of the votes of the district members. Under these circumstances, the Board is reported to have been paralyzed since April.

The District Court reassumed jurisdiction over the case on July 11, 1980. Two primary issues confronted the court. First, as I have noted, substantial dispute had arisen over the legitimacy of the two 1978 district elections. Board members disagreed with one another, not only substantively, but also

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[4] A black was elected to each district seat in 1978.

[5] The nonvoting "chairman" did have the power to break ties.

on the threshold question of whether two of their number were even official Board members at all. In sum, the Board could not function. The District Court resolved the deadlock by holding that the 1978 winners remained the official Board members.

The second issue concerned future elections. Under the District Court's original plan, one district election was to have been held in 1980, and two at-large seats were to expire. The district primary was scheduled for Tuesday, September 2, and the general election for November 4. Without taking evidence or making findings of fact, the District Court on July 25 entered a preliminary injunction that would, as the court characterized it, "preserv[e] the status quo pending a decision on remand." The injunction reinstated the district election plan that we had vacated in April. The injunction was appropriate, according to the District Court, because plaintiffs would be irreparably harmed if the at-large election were held. Holding the district election, by contrast, would not impose significant harm on defendants or on the public interest. Finally, the court thought that the plaintiffs had "a substantial likelihood" of eventually prevailing on the merits.

Defendants—applicants here—sought a stay of the injunction pending appeal. Specifically, they asked that the District Court enjoin the district election scheduled for this fall, and permit the two at-large members now on the Board to continue to serve past the normal expiration of their terms. The District Court denied the requested stay on August 19. Defendants next asked the Fifth Circuit to stay the preliminary injunction. On August 26, that court denied the stay without opinion. Late Thursday, August 28, defendants applied to me to stay the preliminary injunction.

III

I have serious concerns about the process and reasoning underlying the District Court's entry of a preliminary injunction. The District Court and the Court of Appeals in *Brown*

I had invalidated the at-large election law and imposed a system of district elections. We vacated their judgment, and remanded the case for further proceedings. On remand, the District Court purportedly acted to preserve the status quo *pendente lite*, but did so by reinstating its own election plan that we had vacated. After our remand, I would have thought that the slate was wiped clean until there had been further evidence, or at least fresh findings of fact. Until then, the status quo was the presumptively valid election system provided by Alabama law—not the judge-made election plan that we had vacated.

I also was troubled by two additional elements of the District Court's analysis. First, it concluded that the balance of harms heavily favored entering the preliminary injunction. The court seemed to perceive little or no harm to the defendants, and to the public interest, resulting from reinstatement of the judge-created election plan. The court's injunction, however, imposes on Mobile County a method of selecting its School Board members that had not been enacted by state or local elected representatives. While the preliminary injunction is in effect, district elections will be held. These elections may produce—indeed, the District Court intended that they produce—Commissioners who would not have been elected under the longstanding system of at-large elections. As MR. JUSTICE STEVENS observed, "the responsibility for drawing political boundaries is generally committed to the legislative process." *City of Mobile* v. *Bolden*, 446 U. S., at 91 (concurring opinion). The District Court appeared to ignore the fact that altering the voting system established by Alabama law more than a century ago, and since maintained, is a substantial intrusion on local self-government.

Second, the court concluded that plaintiffs had "a substantial likelihood" of success on the merits. Yet, the court made no finding of fact, nor indeed alluded to any fact known to it, to justify that conclusion. Compare Fed. Rule Civ. Proc. 52 (a) ("in granting or refusing interlocutory injunctions the

court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action"). Nor did the District Court explain how the plaintiffs would prove a purposeful violation of constitutional rights as required by the plurality's decision in *Bolden*.[6] Indeed, although we had directed that proceedings on remand be conducted in light of this Court's decision in *Bolden*, our opinion in that case was not mentioned in the District Court's opinion.

IV

It may well be, for the reasons stated above, that the District Court erred in entering the preliminary injunction.[7] The court at least offered unsatisfactory reasons for its decision. Yet, I am reluctant to stay the effect of the injunction. The parties agree that, at this late date, if an election is to occur this fall at all, it must be the district election ordered by the District Court.[8] The applicants therefore urge me to grant a stay that would prevent holding any election at all, and to keep in office, until an at-large election can be held, the incumbents whose terms are due to expire. In *Times-Picayune*

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[6] Moreover, in *Brown I*, the District Court itself had recognized that, in general, it is "a difficult task" to prove "overt racial considerations in the actions of government officials." App., O. T. 1979, No. 78-357, p. 30a.

[7] This opinion is not intended to convey any doubt about the legitimacy of the status of the two Commissioners elected in 1978 pursuant to the District Court's then-operative district election plan. The applicants do not challenge that aspect of the District Court's order.

[8] As often happens (and for reasons that rarely are explained) emergency applications with respect to elections reach us on the eve of the weekend before the election. This places the Court, or the Circuit Justice (as is usually the case), in the unwelcome position of ruling under serious time constraints on the validity of an election that has been planned for months. This is an example. The application was presented to me less than five full days (including the Labor Day weekend) before the scheduled primary election. Had proceedings on remand moved more expeditiously, it might have been possible to hold this fall the at-large elections envisioned by Alabama law.

Publishing Corp. v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers), I summarized the principles that normally guide a Circuit Justice in considering a request for a stay. Although applicants here forcefully argue that the *Times-Picayune* requirements are fully met, I have concluded not to stay the injunction. A Circuit Justice should exercise restraint before staying an interim order entered by a District Court and affirmed by a Court of Appeals.[9] This caution seems especially pertinent where a scheduled election would be enjoined. Thus, in the posture in which this case now comes to me—and in light of the unacceptable alternative of enjoining the fall election and retaining in office incumbents whose terms have expired—I decline to stay the preliminary injunction.[10]

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[9] Just recently, I commented:

"A Circuit Justice should not disturb, 'except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.' *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for orderly disposition of cases on its docket." *Certain Named and Unnamed Noncitizen Children* v. *Texas*, *ante*, at 1330–1331 (in chambers).

[10] Because of the time constraints that I have mentioned, see n. 8, *supra*, I issued an order denying the stay on Friday, August 29, reserving the right subsequently to file this opinion.

GREGORY-PORTLAND INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES ET AL.

ON REAPPLICATION FOR STAY

No. A–203. Decided September 8, 1980

A reapplication to stay, pending appeal to the Court of Appeals, the District Court's decision ordering the busing of students within the applicant school district, is denied.

MR. JUSTICE REHNQUIST.

Applicants have requested me to grant a stay pending appeal to the Court of Appeals for the Fifth Circuit of a decision by the District Court ordering the busing of students within the applicant district. The application, as was proper, was first submitted to MR. JUSTICE POWELL, the Circuit Justice for the Fifth Circuit, and denied by him. It has now been resubmitted to me. As indicated by the cases discussed in the application for stay, *e. g., Columbus Board of Education* v. *Penick*, 439 U. S. 1348 (1978), this Court has been divided for a number of years as to the constitutional propriety of busing orders. If I were casting my vote as a single Justice of this Court, rather than as an individual Justice empowered to grant a stay, I would in all likelihood not only vote to grant certiorari in the case if the Court of Appeals for the Fifth Circuit affirmed it, but would also give the most serious consideration to voting on the merits to reverse that decision. However, as has been frequently pointed out, that is not the role of an individual or Circuit Justice in a case such as this. That obligation is to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.

For these reasons, and because MR. JUSTICE POWELL is the Circuit Justice for the Fifth Circuit, and more familiar with the situation of any case in it than I could be, I am unwilling to "second-guess" his own denial of the application in this case. I accordingly deny the reapplication for a stay.

BOARD OF EDUCATION OF CITY OF LOS ANGELES *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CRAWFORD ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A–214. Decided September 12, 1980

An application to stay, pending consideration of a petition for certiorari, the California Supreme Court's order which left standing a lower court's order requiring mandatory reassignment and busing of upwards of 80,000 first- through ninth-grade students attending approximately 165 elementary and junior high schools in the Los Angeles school system, is denied. Although this Court would probably have jurisdiction over the present action should a petition for certiorari be filed by the applicant Board, nevertheless it is unlikely that four Justices of this Court would vote to grant certiorari in this case, and a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a desegregation plan, would not be a proper exercise of the function of a Circuit Justice.

MR. JUSTICE REHNQUIST, Circuit Justice.

The Board of Education of the Los Angeles Unified School District requests that I stay an order of the California Supreme Court, dated August 27, 1980, which left standing an order of the Superior Court of the State of California for Los Angeles County requiring mandatory reassignment of between 80,000 and 100,000 first- through ninth-grade students attending approximately 165 elementary and junior high schools pending consideration by this Court of its petition for certiorari. On July 7, 1980, the Superior Court entered its final remedial order in this action, finding that the Board had participated in racial discriminatory practices which led to the segregation in the school district and requiring the Board to implement a mandatory busing plan pursuant to guidelines contained in the order. The Board applied to the

Court of Appeal of California to stay the Superior Court's order and, on August 6, 1980, that court partially stayed the order insofar as it relied on a definition of a desegregated school as one where there is a plurality of white students not in excess of 5% over the next largest ethnic group in the school and insofar as it required mandatory busing of students currently attending substantially desegregated schools. The Court of Appeal, however, in all other respects denied the Board's petition for a stay, thus precipitating the current situation where upwards of 80,000 pupils will be bused at the start of school on Monday, September 16, 1980. The court also accelerated the date of oral argument so that the appeal could be heard in January 1981. On August 27, 1980, the California Supreme Court denied, without opinion, the Board's application for a writ of mandamus and/or prohibition to stay in its entirety the order of the Superior Court and recommended that the Court of Appeal accelerate oral argument even further. The California Supreme Court also denied a motion by the original plaintiffs in this action, minority schoolchildren, to vacate the partial stay entered by the Court of Appeal.

This case comes to me after extensive and complicated litigation. Briefly stated, in 1970, the Superior Court issued an opinion finding that the segregation in the school district was *de jure* in nature and that the Board had taken "affirmative" steps which it "knew or should have known" would perpetuate segregation in the district. The specific items detailed in the court's findings included the Board's adoption of (1) a neighborhood school policy, (2) an "open transfer" policy, (3) a "feeder school" policy, and (4) "mandatory attendance areas." In *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976), the California Supreme Court accepted the finding of *de jure* segregation, but did not base its affirmance of the Superior Court's order of mandatory busing on that ground, holding instead that the California Con-

stitution permitted busing to be ordered regardless of the cause of segregation. On September 8, 1978, I denied a stay for this reason. *Bustop, Inc.* v. *Los Angeles Board of Education,* 439 U. S. 1380 (in chambers).

During remand, the California Constitution was amended by way of a state referendum, Proposition I, adopted in November 1979 to eliminate state independent grounds as a basis for court-ordered busing, and the Board contended that the Superior Court's 10-year-old findings did not justify a finding of a federal constitutional violation or the system-wide remedy of mandatory assignment of children by race. In its July 7, 1980, order, the Superior Court apparently rejected that argument, reasoning that the California Supreme Court, in *Crawford,* affirmed the finding of *de jure* segregation. Contrary to the assertions of the respondents, it seems to me that this application necessarily turns on a question of federal constitutional law, as other courts have held. Indeed, I find myself unable to articulate the point better than Judge Cohn of the Superior Court of San Mateo County in *Tinsley* v. *Palo Alto Unified School District,* No. 206010 (July 10, 1980):

> "Turning to the argument that Proposition I violates the 14th Amendment of the U. S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

There is an initial question as to whether this Court would have jurisdiction over the present action if a petition for writ of certiorari were filed. In *Fisher* v. *District Court,* 424 U. S. 382, 385, n. 7 (1976), this Court stated:

> "The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdic-

> tion under 28 U. S. C. § 1257 (3). It is available only in original proceedings of the Montana Supreme Court . . . and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. . . . A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court. *Madruga* v. *Superior Court,* 346 U. S. 556, 557 n. 1 (1954). . . ."

In this action, the Board's petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment of August 27, 1980. I am thus persuaded that this Court would in all probability have jurisdiction over the present action should a petition for certiorari be filed by the Board.

There is no question here as to the standing of the Board, since it is a party to an action which has been required by the Superior Court (respondent) to mandatorily reassign an extraordinarily large number of students in what the Board claims is the largest school district in the Nation. There might be some question of "standing" if the petitioners were a group of whites, "Anglos," or whatever the current terminology used to describe them is, for if the latest 1979 school census submitted by the Board in its application is to be credited, they themselves would be a "minority." That census indicates that in kindergarten and the first three grades of the school affected by the busing order, students classified as "white" ranged from 17.9% to 21.9% of the school population, those classified as "black" ranged from 18.3% to 22.1%, and those classified as "Hispanic" ranged from 57.8% to 48.9%. Application, at 18 (compiled from trial exhibit 11B).

As seems typical with school cases, applications for stay are presented to a Circuit Justice of this Court close to the

opening of school. It appears that the process leading to the formulation of a mandatory busing plan, and the inevitable challenge to it, takes time which apparently is devoted in sufficient amount only as the deadline of school opening approaches. And as has been noted before in many Circuit Justices' opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

The thrust of the Board's petition is that the Superior Court, by relying on the 1970 finding of *de jure* segregation, erroneously found that the Board had violated the Fourteenth Amendment. The Board contends that the Superior Court was required to conduct a hearing as to the existence of a federal constitutional violation rather than rely on 10-year-old findings, since the case law as to what constitutes *de jure* segregation has changed in those years. Were this case presently before the entire Court on certiorari, I would in all probability vote to grant certiorari, since it seems to me that on the basis of the application the findings are even less supportive of a constitutional violation than were those upheld in *Columbus Board of Education* v. *Penick,* 443 U. S. 449 (1979), and *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526 (1979). But that is not the question before a Circuit Justice, and I do not think I in good conscience could say that four Justices of this Court would vote to grant certiorari in this case. One factor militating against the granting of certiorari here is that the Court of Appeal has recognized that the significance of the *Crawford* court's "affirmance" of the finding of *de jure* segregation is ambiguous and it has indicated that it will carefully review the Superior Court's find-

ings of a constitutional violation on review this fall or early next year.

Because the merits of the Board's argument are not free from doubt, the proper disposition of this application for a stay turns on the equities. The Board's primary contention here is that "white flight," which all parties concede has taken place in the school district, will accelerate if this plan is put into effect. Not only will increased "white flight" injure the Board in financial terms, such as in reduced pupil reimbursement from the State, but also a reduction in the number of white students in the district will defeat any hope of further desegregating the schools in the district. Indeed, the Superior Court found that over the past two years, when a mandatory busing plan has been in effect, the district has lost 50,000 white students and that 25,000 of those students withdrew from the district to avoid mandatory reassignment. Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum number of schools may be desegregated.

I find this analysis somewhat troublesome, since it puts "white" students much in the position of textbooks, visual aids, and the like—an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of "white flight" by whatever term it is denominated, *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 438 (1980) (POWELL, J., dissenting from the dismissal of a writ of certiorari as improvidently granted). As MR. JUSTICE POWELL has observed: "A desegregation remedy that does not take account of the social and educational consequences of extensive student transportation can be neither fair nor effective." *Id.*, at 452.

The Court of Appeal here has partially mitigated the potential harm to the Board resulting from "white flight" by rejecting the Superior Court's rigid definition of a desegre-

gated school as one in which there is a plurality of white pupils not in excess of 5% over the next largest ethnic group in the school and by prohibiting mandatory reassignment of students to or from a school which is substantially desegregated. Nonetheless, upwards of 80,000 students will still be bused, although even with school to begin on September 16th it appears from the Board's own application to this Court that the "exact number and identity of all participating schools have not been finalized." I think that a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a plan, would not be a proper exercise of my function as a Circuit Justice, even though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently. The application for a stay is accordingly

Denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1977, 1978, AND 1979 (AS OF JULY 2, 1980)

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1977	1978	1979	1977	1978	1979	1977	1978	1979	1977	1978	1979
Number of cases on dockets	14	17	23	2,341	2,379	2,509	2,349	2,335	2,249	4,704	4,731	4,781
Number disposed of during terms	3	0	1	1,911	1,954	1,982	1,953	1,985	1,828	3,867	3,939	3,811
Number remaining on dockets	11	17	22	430	425	527	396	350	421	837	792	970

	TERMS		
	1977	1978	1979
Cases argued during term	172	168	156
Number disposed of by full opinions	153	153	[1] 143
Number disposed of by per curiam opinions	8	8	[2] 12
Number set for reargument	9	8	1
Cases granted review this term	162	163	158
Cases reviewed and decided without oral argument	129	110	124
Total cases to be available for argument at outset of following term	75	79	78

[1] Includes Nos. 5, 9, 27, 67, and 73 Orig.
[2] Includes Nos. 79–492 and 65 Orig.

SEPTEMBER 18, 1980

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FEDERAL FINANCIAL ASSISTANCE FOR PUBLIC WORKS. See **Constitutional Law**, IV, 3.

FEDERAL-STATE RELATIONS. See also **Habeas Corpus**; **Social Security Act**; **Stays**, 5.

1. *State taxation of logging activities on Indian reservation—Preemption by federal law.*—Arizona motor carrier license and use fuel taxes, sought to be imposed on non-Indian enterprise's logging activities conducted solely on Indian reservation in felling tribal timber and transporting it over Bureau of Indian Affairs and tribal roads to tribal organiza-

FEDERAL-STATE RELATIONS—Continued.

tion's sawmill, are pre-empted by federal law regulating roads involved and regulating management of tribal timber. White Mountain Apache Tribe v. Bracker, p. 136.

2. *State taxation of sales on reservation to Indian tribe—Pre-emption by federal law.*—Arizona had no jurisdiction to impose a tax on appellant Arizona corporation's sale of farm machinery to an Indian tribe occurring on reservation even though appellant did not have a permanent place of business on reservation and was not licensed to trade with Indians, since federal law governing licensing of Indian traders pre-empted asserted state tax. Central Machinery Co. v. Arizona Tax Comm'n, p. 160.

FEDERAL WATER POLLUTION CONTROL ACT. See **Constitutional Law**, VIII.

FIFTH AMENDMENT. See **Constitutional Law, II; III; IV, 1, 3;** VIII; XI; **Stays**, 5, 7.

FIRST AMENDMENT. See **Constitutional Law**, V; VI; **Stays**, 4.

FORT LARAMIE TREATY. See **Constitutional Law**, III; XI.

FOURTEENTH AMENDMENT. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law**, IV, 2, 3; VI; IX; X, 2; **Stays**, 1, 6.

FOURTH AMENDMENT. See **Constitutional Law**, X.

FREEDOM OF RELIGION. See **Constitutional Law**, V.

FREEDOM OF THE PRESS. See **Constitutional Law**, VI.

FREE EXERCISE OF RELIGION CLAUSE. See **Constitutional Law**, V.

FUEL TAXES. See **Federal-State Relations**, 1.

FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law**, VII.

GENDER-BASED DISCRIMINATION. See **Stays**, 7.

GOVERNMENT CONTRACTS. See **Constitutional Law**, IV, 3.

HABEAS CORPUS.

State prisoner—Federal relief—Exhaustion of state remedies.—Absent reason to believe that state judicial remedies would be unavailable, federal court—in habeas corpus proceedings where state prisoner claimed he was entitled to be resentenced because of amendment of state recidivist statute after his trial, but such claim apparently had not been presented to state courts—is required to stay its hand to give State initial opportunity to pass upon and correct alleged violations of federal rights. Mabry v. Klimas, p. 444.

HEALTH STANDARDS. See **Occupational Safety and Health Act of 1970.**

HEARSAY EVIDENCE. See **Constitutional Law, I.**

HERBICIDES. See **Patents.**

HYDE AMENDMENT. See **Constitutional Law, II; IV, 1; V; Jurisdiction; Social Security Act.**

IDENTITY OF NEWS SOURCES. See **Stays, 4.**

ILLINOIS. See **Constitutional Law, IV, 2; Jurisdiction; Social Security Act.**

INCRIMINATING STATEMENTS. See **Constitutional Law, X, 2.**

INDIANS. See **Constitutional Law, III; XI; Federal-State Relations.**

INDIGENTS. See **Constitutional Law, II; IV, 1, 2; V; Jurisdiction; Social Security Act.**

INFRINGEMENT OF PATENTS. See **Patents.**

INJUNCTIONS. See **Stays, 1, 5, 6.**

INTEREST. See **Constitutional Law, III.**

JURISDICTION.

Abortions—Constitutionality of Hyde Amendment.—In an action challenging validity, on federal statutory and constitutional grounds, of Illinois statute prohibiting state medical assistance payments for all abortions except those necessary to save life of woman seeking abortion, District Court lacked jurisdiction to consider constitutionality of Hyde Amendment, prohibiting use of federal funds to reimburse cost of certain medically necessary abortions, since none of parties challenged validity of Hyde Amendment and thus there was no Art. III case or controversy; but this Court has jurisdiction under 28 U. S. C. § 1252 over "whole case," and thus may review other issues preserved by appeals. Williams v. Zbaraz, p. 358.

JUROR'S BELIEF AS TO DEATH PENALTY. See **Constitutional Law, IX.**

JUST COMPENSATION CLAUSE. See **Constitutional Law, III; XI.**

KENTUCKY. See **Constitutional Law, X, 2.**

LEUKEMIA. See **Occupational Safety and Health Act of 1970.**

LIBERTY INTERESTS. See **Constitutional Law, II.**

LICENSING OF INDIAN TRADERS. See **Federal-State Relations, 2.**

LICENSING USE OF PATENTS. See **Patents.**

LOS ANGELES. See **Stays, 2.**

MAINE. See **Civil Rights Act of 1871.**

MANDATORY DEATH SENTENCE. See **Constitutional Law, IX.**

MASSACHUSETTS. See **Stays, 4, 5.**

MEDICAID BENEFITS. See **Constitutional Law** II; IV, 1; V; **Social Security Act.**

MEDICALLY NECESSARY ABORTIONS. See **Constitutional Law,** II; IV, 1, 2; V; **Jurisdiction; Social Security Act.**

METHOD FOR APPLYING HERBICIDE. See **Patents.**

MILITARY SELECTIVE SERVICE ACT. See **Stays, 7.**

MINORITY BUSINESS ENTERPRISES. See **Constitutional Law,** IV, 3.

MISUSE OF PATENTS. See **Patents.**

MOTOR CARRIER LICENSE TAXES. See **Federal-State Relations, 1.**

MULTIPLE OFFENDERS. See **Habeas Corpus.**

NEEDY PERSONS. See **Constitutional Law,** II; IV, 1, 2; V; **Jurisdiction; Social Security Act.**

NEWS MEDIA'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law,** VI.

NEWS REPORTER'S PRIVILEGE. See **Stays, 4.**

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970.

Exposure to benzene—Validity of OSHA standard.—Court of Appeals' judgment holding invalid, as based on findings unsupported by administrative record, Occupational Safety and Health Administration's standard which, because of causal connection between benzene and leukemia, reduced permissible exposure limits on airborne concentrations of benzene and prohibited dermal contact with benzene solutions, is affirmed. Industrial Union Dept. v. American Petroleum Institute, p. 607.

OHIO. See **Constitutional Law, I.**

OIL SPILLS. See **Constitutional Law, VIII.**

PATENTS.

Method for applying herbicide—Patent misuse—Contributory infringement.—Under 35 U. S. C. § 271, owner of patent on method for applying unpatentable chemical herbicide (propanil) to inhibit growth of undesirable plants in rice crops, propanil being a nonstaple commodity having no use except practice of patented method, did not engage in patent misuse either by tying sale of patent rights to purchase of propanil or by refusing to license petitioner manufacturers who sold propanil with directions

PATENTS—Continued.

to purchasers to apply propanil in accordance with patented method, and thus owner may maintain action against petitioners for contributory infringement of patent. Dawson Chemical Co. v. Rohm & Haas Co., p. 176.

POLLUTION. See **Constitutional Law, VIII.**

PRECLEARANCE OF VOTING LAWS. See **Stays, 9.**

PRE-EMPTION. See **Federal-State Relations.**

PRELIMINARY HEARING TESTIMONY AS ADMISSIBLE AT TRIAL. See **Constitutional Law, I.**

PRELIMINARY INJUNCTIONS. See **Stays, 6, 8.**

PRESS AND PUBLIC'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law, VI.**

PRIVACY RIGHTS. See **Constitutional Law, X, 2, 3.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, VIII.**

PROBABLE CAUSE FOR ARREST. See **Constitutional Law, X, 2.**

PROCESS PATENTS. See **Patents.**

PROPANIL. See **Patents.**

PUBLIC CONTRACTS. See **Constitutional Law, IV, 3.**

PUBLIC TRIALS. See **Constitutional Law, VI.**

PUBLIC WORKS EMPLOYMENT ACT OF 1977. See **Constitutional Law, IV, 3.**

RACIAL DISCRIMINATION. See **Constitutional Law, IV, 3; Stays, 6.**

RAILROADS. See **Stays, 8.**

REAPPORTIONMENT. See **Stays, 9.**

RECIDIVIST STATUTES. See **Habeas Corpus.**

REGISTRATION FOR DRAFT. See **Stays, 7.**

RELIGIOUS FREEDOM. See **Constitutional Law, V.**

REPORTER'S PRIVILEGE. See **Stays, 4.**

REPORTING OIL SPILLS. See **Constitutional Law, VIII.**

RESERVATION LANDS. See **Constitutional Law, III; XI; Federal-State Relations.**

RES JUDICATA. See **Constitutional Law, XI.**

RESTRAINING ORDERS. See **Stays**, 5.

RIGHT TO JURY TRIAL. See **Constitutional Law**, IX.

RIGHT TO PRIVACY. See **Constitutional Law**, X, 2, 3.

RIVERS AND HARBORS APPROPRIATION ACT OF 1899. See **Constitutional Law**, VIII.

ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT. See **Stays**, 8.

SAFETY STANDARDS. See **Occupational Safety and Health Act of 1970.**

SALES TAXES. See **Federal-State Relations**, 2.

SCHOOL BOARD ELECTIONS. See **Stays**, 6.

SCHOOLS. See **Stays**, 1–3.

SEARCHES AND SEIZURES. See **Constitutional Law**, X.

SEARCH WARRANTS. See **Constitutional Law**, X, 2.

SECRETARY OF THE INTERIOR. See **Federal-State Relations**, 1.

SELF-INCRIMINATION. See **Constitutional Law**, VIII.

SEPARATION OF POWERS. See **Constitutional Law**, XI.

SETTLEMENT OF ACTIONS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

SEX DISCRIMINATION. See **Stays**, 7.

SIXTH AMENDMENT. See **Constitutional Law**, I; VI; IX.

SOCIAL SECURITY ACT. See also **Civil Rights Act of 1871**; **Civil Rights Attorney's Fees Awards Act of 1976**; **Constitutional Law**, II; IV, 1; V.

Medicaid—Abortions—Hyde Amendment.—Medicaid provisions of Act do not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under Hyde Amendment. Harris v. McRae, p. 297; Williams v. Zbaraz, p. 358.

STANDING TO CHALLENGE LEGALITY OF SEARCH. See **Constitutional Law**, X, 2, 3.

STANDING TO SUE. See **Constitutional Law**, V.

STATE FINANCIAL ASSISTANCE FOR ABORTIONS. See **Constitutional Law**, IV, 2; **Jurisdiction**; **Social Security Act.**

STATE FUEL TAXES. See **Federal-State Relations**, 1.

STATE MOTOR CARRIER LICENSE TAXES. See **Federal-State Relations**, 1.

STATE SALES TAXES. See **Federal-State Relations**, 2.

STAYS.

1. *Alien children—Denial of public education.*—Application to vacate Court of Appeals' stay of District Court's injunction prohibiting Texas education officials from denying free education to alien children not "legally admitted" to United States, is granted. Named and Unnamed Children v. Texas (POWELL, J., in chambers), p. 1327.

2. *Busing of students.*—Application to stay California Supreme Court's order which left standing a lower court's order requiring mandatory reassignment and busing of students in elementary and junior high schools in Los Angeles school system, is denied. Board of Ed., Los Angeles v. Superior Court (REHNQUIST, J., in chambers), p. 1343.

3. *Busing of students.*—Reapplication to stay District Court's decision ordering busing of students within applicant school district, is denied. Gregory-Portland Independent School Dist. v. United States (REHNQUIST, J., in chambers), p. 1342.

4. *Contempt order—Reporter's refusal to reveal news sources.*—Application to stay Massachusetts Supreme Judicial Court Justice's order adjudicating applicant television news reporter in civil contempt for refusal to disclose identities of news sources in connection with disciplinary proceedings against state judge, and Supreme Judicial Court's affirmance of such order, is granted. In re Roche (BRENNAN, J., in chambers), p. 1312.

5. *Double jeopardy—Enjoining state-court proceedings.*—Application for stay of District Court's order denying applicant's request for a temporary restraining order enjoining, on double jeopardy grounds, two separate state-court prosecutions against him, is denied. Willhauck v. Flanagan (BRENNAN, J., in chambers), p. 1323.

6. *Election of school board—Preliminary injunction.*—Application to stay District Court's preliminary injunction ordering Alabama election officials to conduct district rather than at-large election to fill vacancies on Mobile County School Board, is denied. Moore v. Brown (POWELL, J., in chambers), p. 1335.

7. *Military Selective Service Act—Sex discrimination.*—Application to stay District Court's order invalidating registration provisions of Military Selective Service Act on ground that exclusion of females from such provisions constitutes gender-based discrimination in violation of equal protection component of Fifth Amendment, is granted. Rostker v. Goldberg (BRENNAN, J., in chambers), p. 1306.

8. *Preliminary injunction—Bankruptcy of railroad.*—Application to stay District Court's preliminary injunction against implementation of labor

STAYS—Continued.

protection arrangement provisions of Rock Island Railroad Transition and Employee Assistance Act in connection with liquidation in bankruptcy of Chicago, Rock Island and Pacific Railroad, is denied. Railway Labor Executives' Assn. v. Gibbons (STEVENS, J., in chambers), p. 1301.

9. *Voting Rights Act of 1965—Preclearance of apportionment plan.*—Application to stay Court of Appeals' judgment requiring applicant Texas county officials to proceed with procedures for "preclearance," under § 5 of Voting Rights Act of 1965, of new apportionment plan for county commissioner precincts ordered by District Court and approved by county commissioners, is granted. McDaniel v. Sanchez (POWELL, J., in chambers), p. 1318.

SUPPLEMENTAL WORKERS' COMPENSATION AWARDS. See **Constitutional Law**, VII.

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, X, 2, 3.

SUPREMACY CLAUSE. See **Civil Rights Act of 1871.**

SUPREME COURT. See also **Certiorari; Jurisdiction.**

Term statistics, p. 1350.

SUPREME COURT RULES. See **Certiorari.**

TAKING OF PROPERTY. See **Constitutional Law**, III; XI.

TAXES. See **Federal-State Relations.**

TELEVISION REPORTER'S PRIVILEGE. See **Stays**, 4.

TEXAS. See **Certiorari; Constitutional Law**, IX; **Stays**, 1, 3, 9.

TOXIC MATERIALS. See **Occupational Safety and Health Act of 1970.**

TREATIES WITH INDIANS. See **Constitutional Law**, III; XI.

TRIAL BY JURY. See **Constitutional Law**, IX.

TRIBAL ROADS. See **Federal-State Relations**, 1.

TRIBAL TIMBER. See **Federal-State Relations**, 1.

UNAVAILABILITY OF WITNESSES. See **Constitutional Law**, I.

VACATION OF STAY. See **Stays**, 1.

VIRGINIA. See **Constitutional Law**, VI; VII.

VOTING RIGHTS ACT OF 1965. See **Stays**, 9.

WARRANTS. See **Constitutional Law**, X, 3.

WATER POLLUTION. See **Constitutional Law**, VIII.

WELFARE BENEFITS. See **Civil Rights Act of 1871; Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law, II; IV, 1, 2; V; Social Security Act.**

WITHDRAWAL OF PETITION FOR CERTIORARI. See **Certiorari.**

WITNESSES. See **Constitutional Law, I.**

WORDS AND PHRASES.

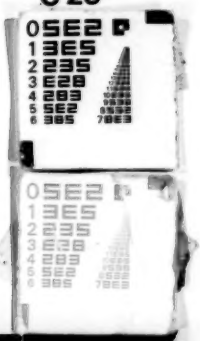
1. *"Any action."* Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Maine v. Thiboutot, p. 1.

2. *"Civil penalty."* § 311 (b)(6), Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6). United States v. Ward, p. 242.

3. *"Prevailing party."* Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Maher v. Gagne, p. 122.

4. *"Reasonably necessary or appropriate to provide safe or healthful employment."* § 3 (8), Occupational Safety and Health Act of 1970, 29 U. S. C. § 652 (8). Industrial Union Dept. v. American Petroleum Institute, p. 607.

5. *"Secured by the Constitution and laws."* Civil Rights Act of 1871, 42 U. S. C. § 1983. Maine v. Thiboutot, p. 1.

WORKERS' COMPENSATION. See **Constitutional Law, VII.**

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